IN THE

Supreme Court of the United States

October Term, 1975

No. 75-752

VICTOR DECOSTA,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CAPITAL CITIES BROADCASTING CORPORATION and CBS FILMS, INC.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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(Respondents' Appendix contained herein)

The respondents respectfully request that the Court deny the Petition for a Writ of Certiorari to review the opinion and judgment entered in this case on June 24, 1975 by the United States Court of Appeals for the First Circuit.

Questions Presented

Petitioner fails to substantiate the argument suggested in Questions "1." and "2." (pb-2,3)* and later pursued (pb-17-25) that the Court of Appeals' rejection of the Dis-

* "pb- " will be used hereinafter to refer to page numbers in the Petition before the Court.

trict Court's application of a "manifest error" standard of review as to the Magistrate's conclusions of law has created a "confused and unmanageable" standard for other federal courts in the realm of consensual references. Given the present state of the law * and the record before it, the Court of Appeals' decision on this issue was eminently correct and raised no questions sufficiently important to warrant review.

With respect to Questions "3." and "4." (pb-3) it is clear that no substantial federal question has been raised by the Court of Appeals' substantive rulings. The Court below never determined the alleged issue proffered in Question "3." except to correctly hold that in the Court of Appeals the Magistrate's findings of fact, as confirmed by the District Court, were subject to "clearly erroneous" review even though "final", and that conclusions of law were fully reviewable. The Court of Appeals then proceeded to treat the Magistrate's finding of "likelihood of confusion" as a "final" finding of fact and rejected it for the reason that, on the entire evidentiary record before it, the Court of Appeals was left with the firm conviction that the Magistrate had committed a mistake, and that the District Court's *pro forma* confirmation of that mistake constituted reversible error.

In addition to the fact that Question "4." incorrectly suggests that petitioner's Paladin materials ** and respondents' similar service marks were "competing" (pb-3), the Question evidences a misconception on petitioner's part

* 28 U.S.C. § 636(b) and pending Congressional amendments thereto. See Reasons for Denying Writ IC, *infra*.

** The avocational moniker, slogan, knight chess piece and other items allegedly created by petitioner will hereinafter be referred to as "the Paladin materials".

that this Court sits as a final trier of fact. The Supreme Court has repeatedly stated to the bar that it will not grant Certiorari to review cases which turned below entirely on issues of fact and the application of proper legal rules to the facts because such cases must be viewed as presenting no more than intrinsic importance to the litigants at bar. This is such a case.

Statement of the Case

Petitioner's statement of the case is correct only to the extent that it restates the 12-year travel of this case and quotes from the language of the opinion below. Respondents' principal objections to petitioner's confusing attempts to interpret the record and opinion below will now be set forth.

Petitioner erroneously suggests (pb-8) that it has already been determined in this case that respondents misappropriated and exploited petitioner's "characterization". Even if it could be argued that the jury at the trial of Count One found that respondents had misappropriated a "characterization" created by petitioner (i.e., an idea for a literary character),* the Court of Appeals in reversing that verdict correctly recognized that respondents' alleged copying and exploitation were limited to petitioner's "calling card" containing his avocational moniker ("Paladin"), slogan ("Have Gun—Will Travel"), knight chess piece symbol and a photograph of petitioner wearing his black cowboy costume and accoutrements.

* Such an argument would not be persuasive for the reason that the jury's verdict on Count One was a general verdict without special questions.

Nor is it correct for petitioner to cite the Court of Appeals' reference to this case in its 1967 opinion (377 F.2d at 316) as one of "coincidence run riot" to support the intimation that respondents relied on "innocent coincidence" as their principal defensive theory in the 1966 trial in this action (pb-8). Respondents' defensive theory at trial, to the contrary, was premised on three major points: 1) respondents' categorical denial of the allegation that they copied any of petitioner's Paladin materials; 2) the contention that respondents created their Paladin costume, calling card and accoutrements without access to, and thus independently of petitioner's Paladin materials; and 3) the contention that petitioner acquired most of his Paladin materials *from respondents* after he watched episodes of "Have Gun Will Travel"* following the program's premiere in late 1957. The latter contention unfortunately could not be established at trial due to the fact that petitioner's six-year delay in commencing action severely hampered respondents' efforts to secure evidence to rebut the testimony of some of petitioner's witnesses that his Paladin materials existed before 1957.

At pb-10 petitioner characterizes the first count of the Third Amended Complaint as having alleged a claim for "unjust enrichment". The first count in fact purported to state a claim sounding in "idea theft" recognized under applicable New York law ** as a claim alleging a contract implied in law. Notwithstanding the fact that the Court of Appeals ruled that petitioner's "idea theft" claim was Constitutionally barred, the Court of Appeals' 1967 reversal and dismissal of the first count was also correctly grounded on petitioner's failure to produce a shred of

* Hereinafter referred to as "HGWT".

** A-24; footnote 26.

evidence to support his cause of action under New York's common law of ideas. See, 377 F.2d 315 at 318, 320 (1st Cir. 1967).* Thus the Court of Appeals' recognition of the fact that its 1967 ruling may have been "overinclusive" in light of this Court's subsequent rulings in *Kewanee* and *Goldstein* (pb-10) in no way supports petitioner's intimation that the Court of Appeals in effect conceded that his damage award under Count One "should have been sustained" and that this Court should perhaps grant review to retroactively apply the rulings of *Kewanee* and *Goldstein* to the claim finally adjudicated in 1967. (See Reasons for denying Writ II B, *infra*.)

Petitioner's assertion (pb-12) that the District Court entered the order of reference "by agreement of all parties" is somewhat misleading. Counsel for the parties did not confer and bilaterally agree to submit their cross-motions for summary judgment to a United States Magistrate for plenary disposition, nor did they request of the Court that it approve such procedure. Thus it is clear that the District Court's order of reference was not based on an agreement of the parties to have their motions tried before a tribunal other than the District Court.** In reality, the District Court decided on its own initiative to refer

* Petitioner failed to establish with any believable evidence that any one or a combination of his Paladin materials was objectively original ("novel"), reduced to concrete form or had been submitted to defendants under a mutually acceptable understanding that if the materials were used, respondents would compensate petitioner for their reasonable market value at the time of submission. Additionally, petitioner never produced a shred of evidence that respondents ever had access to his materials. See *Downey* v. *General Foods Corp.*, 31 N.Y. 2d 56, 286 N.E.2d 257 (1972) and cases cited therein. The elements of the claim are also recognized and followed in the First Circuit. *Puente* v. *President and Fellows of Harvard College*, 248 F.2d 799 (1957), *cert. den.* 356 U.S. 947 (1958).

** Compare, *Kimberly* v. *Arms*, 129 U.S. 512 at 516-517.

the cross-motions to alleviate its heavy trial calendar and asked counsel whether there were any objections. Having reached the conclusion that objection would serve no useful purpose, counsel for respondents acquiesced in the District Court's announced intention, and counsel for petitioner also agreed thereto.* Thus the reference was "consensual" as to respondents only to the extent that they did not object to it.

At pb-12, 13 and again at pb-18, 19, petitioner refers to the Magistrate's conclusion that respondents' alleged copying created a "likelihood of confusion" as the "critical issue respecting the merits of the case". This analysis is incorrect to the extent that it omits the Court of Appeals' extremely significant threshold ruling which rejected the Magistrate's finding of mixed fact and law that petitioner was the owner at common law of the marks in question. The Court of Appeals correctly held that at the present time the common law of service marks and unfair competition of no state recognizes the non-commercial use of a name, slogan or symbol by an individual solely for his own amusement as a sufficient evidentiary basis on which to hold that there has been acquisition of a protectible property right in such materials. Even though the Court of Appeals' decision on the merits did not rely on this ruling, that Court's later discussion of "likelihood of confusion", culminating in its rejection of the Magistrate's clearly erroneous finding on that issue, shows that substantial weight was accorded to the fact that petitioner never used the Paladin materials in connection with an established business or non-profit institution as symbols of a valuable commercial goodwill. (See, Reasons for Denying Writ II A, *infra*.)

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* *See* Record on Appeal below; paragraph 11 of respondents' Petition for Leave to Appeal to Court of Appeals.

REASONS FOR DENYING THE WRIT

I.

The Writ should be denied as to Questions "1." and "2." presented for review.

A. No conflict of decisions has been or will be created by the Court of Appeals' ruling that the "unless clearly erroneous" standard set forth in Rule 52(a) FRCP must be utilized by a Court of Appeals reviewing a District Court's confirmation of a U.S. Magistrate's report in a consensual reference of dispositive cross-motions.

Respondents' thorough review of the post-1968 Federal Reporter, Second Series * has failed to unearth a single decision of any Court of Appeals which raises the slightest conflict with the rationale or language employed in the ruling in question. It is apparent, then, that the alleged "unmanageability" (pb-20) of the procedure promulgated by the Court of Appeals below has been raised as an issue solely for the purpose of securing this Court's review of the dispositive ruling below that a finding of "likelihood of confusion" is a legal impossibility on the record in this case. (See, *infra*, Point II A, B.)

There is no merit in petitioner's suggestion that the opinion below "clearly rejected" (pb-17) the "manifest error" standard of review for consensual references voiced in *dictum* ** by a 19th Century predecessor of this Court

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* The United States Magistrates Act, 28 U.S.C. §§ 631-639, was passed into law in 1968.

** See 5A Moore's Federal Practice, § 53:15, pp. 3044-3046: "Subdivision (e)(4) [of Rule 53 FRCP] may have modified the pre-existing law in some degree. Previously many courts were constrained to hold, following a dictum in *Kimberly* v. *Arms*,[1] that in a reference by consent of the parties more than ordinary weight was to be given the master's report. . . ."

* * *

". . . Rule 53(e)(4) expressly provides that 'The effect of a master's report is the same whether or not the parties have consented to a reference . . .' Any prior case law to the effect that a reference compels extraordinary weight to be given to the master's report is no longer in point." (Matter in brackets supplied; citation at "1" omitted.)

[*Kimberly* v. *Arms*, 129 U.S. 512 (1889)]. Petitioner's argument is vitiated in the first instance by the fact that *Kimberly* was decided nearly five decades before the effective date of the Federal Rules of Civil Procedure. Any present-day reliance on *Kimberly* for the proposition that a consensual reference to a master binds a District Court to accept a Magistrate's legal conclusions unless they are "manifestly" erroneous is misplaced because it, like *Kimberly*, takes no cognizance of Rule 53(e) FRCP.

Petitioner never clearly commits himself as to whether he does or does not rely on *Kimberly*.* For example, if petitioner in fact submits that *Kimberly* should have been viewed as controlling by the Court of Appeals, he perforce must accept Professor Moore's correct view that passage of the Federal Rules of Civil Procedure has rendered its *dictum* as to conclusions of law "no longer in point" **. But if, on the other hand, petitioner intends to maintain that the Court of Appeals erred in "importing" the restrictions of Rule 53(e)(4) FRCP into the issue (pb-23) because the motions below were referred under the "additional duties" language of 28 U.S.C. § 636(b) rather than the provision of the statute expressly dealing with masters [28 U.S.C. § 636(b)(1)], then he must divest himself of his apparent reliance on *Kimberly*, which on its face can only be read to pertain to a reference to a master.

Even if *Kimberly* had remained unglossed by Rule 53(e) FRCP, it would be impossible to find that the decision below presents a direct conflict because the Court of Appeals' ruling substantially adopted the *dictum* of that case.

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* Compare petitioner's "rejection" allegation, pb-17, with footnote 11 appearing at pb-25.

** Perhaps this Court was the first to recognize that the *dictum* in *Kimberly* "lacks content . . ." (A-13); see, *Davis* v. *Schwartz*, 155 U.S. 631 at 637 (1895).

In accepting as controlling the "finality" provision of Rule 53(e)(4) as to the Magistrate's findings of fact * the Court of Appeals in effect ruled in accord with *Kimberly* to the extent that the *dictum* of that decision prescribed that a master's findings of fact in a consensual reference are to be treated as presumptively correct by the District Court in its initial review.

In the premises, the Court of Appeals' opinion that *Kimberly* lacks content to the extent that its *dictum* no longer applies to district court review of legal error, falls far short of presenting a *direct* conflict with any decision of this Court which has retained its vitality as a correct statement of currently applicable law.**

B. The rectitude of the Court of Appeals' review of the Magistrate's report pursuant to the "unless clearly erroneous" standard of Rule 52(a) FRCP cannot be successfully challenged regardless of the ruling below that the District Court erred in failing to review the Magistrate's erroneous legal conclusions.

At pb-17, 18 and again at pb-21 through 23 petitioner unsuccessfully attempts to attack the rigor of the Court of Appeals' intrinsic logic in ruling that the District Court erred in refusing to review the Magistrate's legal conclusions and that Rule 52(a) mandated the Court of Appeals' standard of review.

The logic employed by the Court of Appeals in rendering the subject rulings is not invalidated to the slightest degree by petitioner's assault. The Court of Appeals cor-

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* Despite the fact that respondents did *not* enter into a voluntary undertaking of factual finality; see respondents' statement of the case, *supra*.

** See, *e.g.*, *Supreme Court Practice*, R. L. Stern and Eugene Gressman (4th Ed., 1969), at page 157.

rectly reasoned (Reasons for Denying the Writ I A, *supra*) that, regardless of the standard applied by the District Court, the Court of Appeals was not bound to accept the dictum of *Kimberly* v. *Arms, supra,* that the Magistrate's legal conclusions must be accepted unless manifestly erroneous (A-13). Then, having recognized its duty to "safeguard" the impartiality of the procedure before the Magistrate (A-13) to insure that the decision was not infected with prejudicial error, and having recognized the fact that Congress, at the time the Court of Appeals authored the opnion below, had not yet taken penultimate steps in fashioning a review procedure for consensual references to Magistrates, and being aware of the strong suggestions of this Court in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957) respecting the primacy of Rule 53 FRCP considerations where the integrity of the process may be threatened (A-11, 12),* the Court of Appeals felt it was well justified in relying on Rule 53(e)(4) FRCP to provide manageable guidelines for a *pro tempore* standard of review in this case.

Having thus reviewed and accurately stated the factual conclusions and legal framework of the issue, the Court of Appeals ruled that the District Court erred in refusing to review the Magistrate's *legal conclusions* for prejudicial error. The Court of appeals *did not* rule, however, that the District Court erred in viewing the Magistrate's findings of fact as "final" (*i.e.*, "presumptively correct") except for "manifest error". Petitioner's attack fails because it proceeds on the faulty assumption that the Court of Appeals ruled that the clearly erroneous standard of Rule

* Not to mention that Court's awareness of its own prior admonitions in this connection, *O'Shea* v. *United States,* 491 F.2d 774 (1st Cir. 1974), and those of this Court, *Wingo* v. *Wedding,* 418 U.S. 461 (1974).

52(a) FRCP applied *to the factual review of the District Court* even though the Court of Appeals had confirmed the "finality" of the Magistrate's findings for the purpose of the lower court's review. All that was held below was that Rule 52(a) applied to the Court of Appeals' review, that the District Court was arguably * correct in reviewing the Magistrate's findings of fact only for "manifest error" and that the District Court erred in declining to review the Magistrate's legal conclusions.

Petitioner's implicit contention that the Court of Appeals erred in reviewing the Magistrate's report pursuant to Rule 52(a) FRCP also lacks merit. The Congressional mandate of Rule 52(a) requires the Court of Appeals to review challenged factual findings of a United States District Court for clear error and to scour the legal conclusions below for any prejudicial error of law. Since the District Court's confirmation of the Magistrate's report placed the findings and conclusions it contained before the Court of Appeals on the same footing as if they had been the findings and conclusions of the District Court—subject to review under the standard formulated in Rule 52(a) FRCP—it is clear that the *ratio decidende* employed by the Court of Appeals is unassailable not only in terms of its intrinsic logical rigor, but also in the sense that it is eminently correct from a strictly legal point of view.**

* "We need attempt no categoric answer to this issue. . . ." Opinion below, A-14.

** Petitioner misplaces his reliance (pb-22, footnote 8) on Professor Moore's statement that a reviewing court must accept findings stipulated for finality except where the master has been guilty of an abuse of discretion. The learned commentator was referring solely to district court review under Rule 53(e)(4). A Court of Appeals must render "a real review". *Beckley National Bank* v. *Boone,* 115 F.2d 513, 515-516 (4th Cir. 1940), *cert. denied,* 313 U.S. 558 (1941).

Petitioner refers the Court to no objective or procedural standard by which it could be found on review that it was inconsistent to rule that, on one hand, Rule 53(e)(4) should have controlled the District Court's review of the Magistrate's findings (findings of fact "final" but legal conclusions fully reviewable), and that on the other the Court of Appeals was required by Rule 52(a) to "treat the factual findings of the Magistrate adopted by the District Court as subject to the clearly erroneous standard, and to treat the legal decision of the Magistrate as subject to the full review of this Court." (A-15) Petitioner's apparent thesis (pb-17-25) that other federal courts may experience difficulty in interpreting the logic of the ruling in question is belied by its obvious discernability. In any case, even if there were a lack of logical rigor in the opinion below, that fact alone would surely fall far short of a demonstration that this case is sufficiently important to warrant review.

C. Legislation amending 28 U.S.C. § 636(b), which is currently awaiting passage into law (S. 1283 and H.R. 5575), substantially confirms the rectitude of the Court of Appeals' rulings.

Petitioner's attempt to demonstrate reviewable importance in the reference rulings * loses all persuasive force when it is recognized that the task of promulgating standards of review for all types of references to United States Magistrates (pb-20) has already been undertaken and is presently awaiting passage into law in the Congress of the United States.

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* As to "importance," generally, see Stern and Gressman, *Op. Cit.*; p. 167.

S. 1283,* introduced by Senator Quentin Burdick of North Dakota on March 21, 1975, was thereafter referred to the Senate Judiciary Committee and thence to the Subcommittee on Improvements in Judicial Machinery. In July, 1975, the Subcommittee held hearings before which United States District Court Judge Charles M. Metzner (Southern District of New York)** and Morley L. Sear, a U.S. Magistrate,*** testified that their organizations are in complete accord with S. 1283 to the extent that the Bill clarifies the authority of the district courts to refer dispositive and other motions to Magistrates and promulgates standards of review applicable to each class of reference. A copy of the revised version of S. 1283, as approved by the Subcommittee and favorably reported to the Senate Judiciary Committee, along with the Subcommittee hearings and a draft of a proposed favorable report on the Bill from the Senate Judiciary Committee to the full Senate are reprinted in the appendix to Respondents' Brief (RA 1 through 61).****

It should be noted prefatorily that S. 1283 completely negates whatever significance may ever have attached to the "consensual" nature of a reference of dispositive

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* H.R. 5575, a bill identical in all material respects to S. 1283, is presently awaiting hearings before the House Committee on the Judiciary and Civil Liberties.

** Chairman of the Judicial Conference Committee on the Administration of the Federal Magistrate System.

*** Chairman of the Legislative Committee, National Council of U.S. Magistrates.

**** William P. Westphal, Esq., Chief Counsel to the Subcommittee, has informed counsel for respondents that it is very likely that S. 1283 will be approved by the Senate Judiciary Committee and favorably reported out to the Senate floor during the second session of the Ninety-Fourth Congress, on or about January 20, 1976. No serious opposition to the bill—either in the Judiciary Committee or on the floor of the Senate—is presently anticipated.

motions to a U.S. Magistrate. Under S. 1283 a United States District Court Judge has the complete discretion to refer (and thus need not secure litigant consent in order to refer) a dispositive motion. "Consent" is relevant only to the right of the parties litigant to object to a reference to a Magistrate to perform the functions of a master* and is then relevant only to the extent that a reference upon consent enables the Court to dispense with the "exceptional condition" provision of Rule 53(b) FRCP. [Compare, subsections (b)(1)(A)(B) and (C) of S. 1283 to subsection (b)(2); RA 61.]

The portions of S. 1283 relevant to Questions "1." and "2." presented for review may be summarized in the following manner:

> 1.) A District Court Judge has the full discretion to refer to a U.S. Magistrate for hearing and determination a motion which is not dispositive of the action. If objection is made to the determination of the Magistrate, the District Court must review the Magistrate's findings under a "clearly erroneous" standard of review; conclusions of law are fully reviewable. [S. 1283; (b)(1)(A), RA 61.]
>
> 2.) A District Court Judge also possesses full discretion to refer dispositive motions—such as the cross-motions for judgment in the instant litigation—to a Magistrate, but only for review and the preparation of a report, to be presented to the District Court, setting forth the Magistrate's proposed findings and recommendations for disposition. [S. 1283; (b)(1)(B), RA 61.]

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* *Eg.*, ministerial tasks such as reviewing and reporting on the evidence.

> 3.) Should there be an objection to such a report, "A judge of the court shall accept, reject or modify in whole or in part, the findings or recommendations made by the magistrate." [S. 1283; (b)(1)(C), RA 61.] In short, no "finality"—indeed no weight at all—need be accorded by a District Court to the legal conclusions contained in the report of a U.S. Magistrate following the reference of a dispositive motion.*

Thus to the extent that the Court of Appeals rejected respondents' contentions below respecting the constitutionality of the reference, and the District Court's application of a "manifest error" standard to the legal conclusions of the Magistrate, it is abundantly clear that Congress' imminent amendment to 28 U.S.C. § 636(b) fully confirms the rectitude of the opinion below.

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* The standard thus enunciated is based on the procedure for review of a master's report promulgated in Rule 53(e) FRCP. (Hearings before Subcommittee; RA-31, 32). Professor Moore explains that the standard gives the district court wide discretion in dealing with a report, subject only to the condition of the "clearly erroneous" rule. 5A Moore, §§ 53:12, pp. 2998, 3001, 3008-3010, 3011-3014, 3021; 53:13[2], p. 3032.

II.

The Writ should be Denied as to Questions "3." and "4." presented for Review.

A. The Court of Appeals' reversal of the District Court's order granting judgment to petitioner presents no direct conflict with decisions of other Courts of Appeals on the issues of whether "likelihood of confusion in the market place" is an issue of fact or of law, and the quantum of evidence required to correctly find a likelihood of consumer confusion, and thus does not raise questions of sufficient importance to warrant review.

Petitioner appears to have mistated the opinion below in suggesting (pb-26) that the Court of Appeals held that petitioner established a protectible property right in his Paladin materials as "service marks" under the common law. The Court of Appeals correctly rejected the Magistrate's erroneous finding of mixed fact and law that petitioner is the owner of common law service marks in the Paladin materials. The court below held that the common law of service marks and unfair competition of no state presently recognizes an individual's avocational use of a name, slogan, symbol or costume as a sufficient basis on which to predicate a property right in such materials as service marks.* Then, apparently in order to reach and determine the clearer issue of "likelihood of confusion,"** the Court of Appeals assumed *arguendo* that petitioner had acquired a common law property right in respondents' marks. (A-23). Thus reversal and dismissal of Counts

* It is significant that petitioner challenges neither this ruling, nor the ruling that petitioner suffered no damage (A-17).

** The Court of Appeals apparently accorded undue emphasis to cases protecting the corporate names of not-for-profit institutions, each of which, unlike petitioner, possessed a valuable commercial goodwill upon which competitors were attempting a "free ride".

Two and Three of the complaint could have been grounded on the threshold issue with equal rectitude. *Heinemann* v. *General Motors Corp.*, 342 F. Supp. 203 (D.C. N.D. Ill. 1972), *aff'd* 478 F.2d 1405 (7th Cir. 1973) (unpublished opinion); *Sayles Biltmore Bleacheries* v. *Narragansett Wiping Supply Co.*, 86 R.I. 99, 134 A.2d 57 (1957); *Anderson* v. *National Broadcasting Co., Inc.*, 178 F. Supp. 762 (D.C. S.D. N.Y. 1959); see, *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 412-414 (1916); *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U.S. 90, 96 (1918).

Indeed, only when the thrust of the threshold ruling is recognized can the Court of Appeals' dispositive ruling be placed in a proper conceptual frame. It is the entirely unique factual complexion of the case at bar* which places the issue of "likelihood of confusion in the marketplace" in its proper perspective in terms of reviewable importance, and also demonstrates conclusively that the Court of Appeals' ruling on that issue was correct.

Question "3." (pb-3) falls short of raising a viable issue for review because it proceeds on the erroneous assumptions that the Court of Appeals in fact decided that the issue of "likelihood of confusion in the marketplace" is one of law, and thus reviewed the finding without regard to "clearly erroneous" restrictions.**

Even if the Court of Appeals had rendered a specific ruling on this purported issue, thus aligning it with one or the other of the two lines of decisions in the Circuits, it is

* "(petitioner) sold no product, services or institution, charged no fees, and exploited only himself." 377 F.2d at 316; see, A-19, 20 (matter in parentheses supplied).

** That this assumption was necessary to the success of petitioner's argument can hardly be doubted; only if the Court of Appeals accorded *de novo* review could petitioner assert that he was substantially aggrieved by the ruling.

clear that the ruling would have been in accord with the decisions which hold that "likelihood of confusion in the marketplace" is a question of fact which must be accorded "clearly erroneous" review on appeal.* No other conclusion is possible in view of the treatment given the finding by the Court of Appeals. Following discussion of the factors determinative of the issues, and the insubstantial evidence relied upon by the Magistrate in this connection, the court below held:

> "The magistrate's findings being treated as final, they are here subject to the same standard of review as are district court findings under Fed. R.Civ.Pro. 52(a). They must be accepted unless clearly erroneous. On this issue ["likelihood of confusion in the marketplace"], however, we see no alternative to saying the finding is not supported." (A-26; matter in brackets supplied.)

Had the court below treated the subject issue as one of law, obviously no such discussion would have been required. Thus Question "3." in effect presents no more than a request for an advisory opinion as to which line of federal decisions on the issue is correct.

Nor does "the degree of proof" necessary to demonstrate "likelihood of confusion in the marketplace" (pb-28)** pose the type of question which this Court has often chosen to review. It is the law in *all* states of the Union that the quantum of evidence required to find "likelihood

*Under New York law, which is controlling at bar, the issue of likelihood of *customer* confusion is the ultimate *factual* issue in an unfair competition action involving trade or service marks. See, McCarthy, *Trademarks and Unfair Competition*, Vol. 2, § 23:22 (C), p. 79 (1973) and *Dell Pub. Co.* v. *Stanley Publications, Inc.*, 9 N.Y.2d 126, 172 N.E.2d 656 (1961).

** Question "4." presented for review.

of confusion" cannot be reduced to a formula. The conclusion of the trier of fact on that issue is highly subjective because it must be premised on the unique facts of each case. McCarthy, *Op. Cit.*, § 23:26, pp. 84-87. The Court of Appeals concluded that the Magistrate erred in this case because the Court of Appeals was convinced that on the basis of all the evidence * a mistake had been committed. Accordingly, the ruling below cannot be compared with decisions elsewhere relying on a different yet still subjective quantum of evidence. It suffices to say that just as an intelligent and discriminating purchaser could not have been deceived by a juxtaposition of the "Cranston Paradigm" (A-17) and HGWT, neither was the Court of Appeals.**

* Particularly compelling were the facts that petitioner was a local manikin who did not have "customers" and respondent CBS is a national television network selling "Have Gun Will Travel" advertising time to sponsors (A-26). That is the *only* significance in petitioner's sympathy-seeking comment (pb-29) that the parties' "size" disparity should not have been a factor in the Court of Appeals' decision.

** Competent evidence of "likelihood of confusion *in the marketplace*" or "likelihood of *customer* confusion", is not supplied by proof that someone at sometime made an erroneous identification outside the context of commerce, but whether potential customers would be likely to purchase an infringer's goods, when in fact they had intended to purchase the complainant's, by virtue of a deception caused by confusingly similar marks or trade dress. See, *McGraw-Hill* v. *American Aviation Assoc's.*, 117 F.2d 293, 295 (D.C. Cir. 1940) and compare, *Standard Oil Co.* v. *Standard Oil Co.*, 252 F.2d 65, 74 (10th Cir. 1958); McCarthy, *Op. Cit.;* § 23:21, pp. 73-75; A-25, footnote 27; A-26, footnote 28.

B. Review is not warranted to consider petitioner's suggestion that the Court should apply the decisions in *Goldstein* and *Kewanee to the Court of Appeals' 1967 decision reversing jury verdicts and entering final judgment for respondents on the "idea theft" claim of Count One.**

The argument proffered at pb-10 is not persuasive because it fails to come to grips with the fact that the appeal which culminated in the reversal of petitioner's 1966 jury verdicts on Count One was taken from a District Court order directing that *final judgment* on Count One be entered in favor of petitioner pursuant to Rule 54(b) FRCP (Record Appendix, Vol. I at p. 220). In taking jurisdiction over and adjudicating the 1967 appeal, the Court of Appeals in effect confirmed the finality of that judgment. Indeed, in 1975 the Court of Appeals held that:

> "What we decided in *DeCosta I* has settled, for this case, the issue of misappropriation." (A-18)

When petitioner sought a Writ of Certiorari to review the final judgment entered for respondents on Count One and his Petition was denied, litigation on the merits as to that claim came to an end. *Cf. Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965). Absent fraud or some other factor** which could be viewed to invalidate the final judgment on Count One entered in favor of respondents following their 1967 appeal, petitioner is barred by the doctrine of *res judicata* from using the present proceeding as a device to mount a collateral attack on that judgment. 1B Moore, *Federal Practice*, § 0.401 at pp. 11-12, § 0.405 at p. 628 quoting from *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946).

---

* *Goldstein* v. *California*, 412 U.S. 546 (1973); *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974).

** Petitioner makes no such allegation, and there is no evidence in this record which could support the allegation if it were made. *See, Sea-Land Services Inc.* v. *Gaudet*, 414 U.S. 573, 578-579, *reh. denied*, 415 U.S. 986 (1974).

The real thrust of petitioner's argument is that this Court should declare the rulings in *Goldstein* and *Kewanee* to be retroactive. But these decisions clearly are not the type of cases to which this Court normally accords retroactive effect. *See, Linkletter* v. *Walker, supra,* 381 U.S. at 627; Barry R. Ostrager, *Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations,* 19 New York Law Forum 289 (Number 2, Fall 1973).

More significantly, neither decision has the slightest applicability to the issue decided in Count One. *Goldstein* and *Kewanee* (pb-10, fn.2) stand for the proposition that state legislatures and courts are not constitutionally preempted from creating and enforcing statutory or common law remedies for the conversion of a tangible object or creation unprotected by federal law, and the use of such object against its creator in an unfairly competitive manner. The Law of New York is in accord. See, *Columbia Broadcasting System, Inc.* v. *Documentaries Unlimited,* 42 Misc.2d 723, 248 N.Y.S.2d 809 (Sup. Ct. New York County, 1964); *Metropolitan Opera Assoc.* v. *Wagner Nichols Recorder Corp.*, 199 Misc. 786 (Sup. Ct. New York County, 1950), *aff'd* 279 App. Div. 632 (1st Dept. 1951). Mere copying, as this Court took pains to note (*Goldstein,* 412 U.S. at 550-551, 571) is still constitutionally permissible. (*Accord, Miller* v. *Universal Pictures Co.*, 11 A.D.2d 47, 49 (1st Dept. 1960), *aff'd* 10 N.Y.2d 972 (1961); *Booth* v. *Colgate-Palmolive Co.*, 362 F. Supp. 343 (D.C.S.D.N.Y. 1973). Since copying *simpliciter* is all that can be fairly gleaned from Count One, and the only finding that plaintiff's trial evidence could arguably be viewed to have supported,*

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* "Misappropriation *of the thing itself*", or conversion is not alleged, and no evidence exists to support such allegation. The Court of Appeals has twice held that "passing off" is not supported by any evidence, and petitioner has not taken issue therewith on either occasion.

petitioner's reference to the rulings in *Kewanee* and *Goldstein* as a possible additional reason for granting the Writ is clearly devoid of merit.

III.

The consequences of granting the Writ in and of themselves constitute sufficient reasons for denying it.

Vexing problems would be created for the federal judiciary if the Court were to grant the Writ and review and reverse the opinion below along the lines suggested by petitioner. Two such problems are immediately apparent.

Such a ruling would directly conflict with imminent Congressional action to promulgate standards of review for dispositive motions referred to U.S. Magistrates which are less restrictive than review only for "manifest error" of fact and law (S. 1283 and H.R. 5575). (See, Reasons for Denying Writ I C. *supra.*)

Any ruling by this Court that a "manifest error" standard must be applied to both District Court and Court of Appeals review of a Magistrate's legal and factual conclusions in all consensual references clearly would have the effect of usurping litigants' recognized existing right to determine the extent to which they wish to be bound by a Magistrate's report, and would also have the effect of drastically reducing recourse and increasing litigant resistance to the procedure.

Respondents respectfully submit that the latter prediction is an extremely cogent one. It is appropriate to ponder the effect on counsel, confronted with a District Court's desire to refer (and thus the necessity of "consenting" or objecting thereto), of the prescription by this Court of a "manifest error" standard of review for a Magistrate's

report as to both fact and law should the parties "consent". Would not counsel be compelled to vigorously resist reference in the knowledge that if there were first-instance disposition by the District Court, the standard of review to be applied to objections on appeal would be far less stringent? Does not petitioner's argument in effect propose a system, actuated only by the amorphous concept of litigant "consent," in which the findings and conclusions of a U.S. Magistrate are significantly less susceptible to searching appellate review than that of a U. S. District Court? Affirmative answers are clearly indicated.

Any response that "consent" would imply knowing acceptance of the standard would only beg the question. In the truest sense all references to U.S. Magistrates—whether requested by the parties or politely *suggested* by a busy District Court Judge—are "consensual". Thus in the real life of the federal judiciary, the application of a "manifest error" standard for "consensual" references would become truly uniform.

The spectres outline above possess sufficient substance to compel the greatest restraint in contemplating any move to upset the Court of Appeals' logically consistent, practically manageable and legally correct method of delimiting the role which "manifest error" review should fill in the federal magistrate system. Restraint seems especially appropriate where Congress, fully cognizant of the need for uniform standards of review in this context, is on the verge of providing standards which exclude any recourse to "manifest error" review regardless of the nature of the reference or the matter referred.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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On the Brief:

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PAMELA G. OSTRAGER
December 23, 1975

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-752

—o—

VICTOR DECOSTA,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CAPITAL CITIES BROADCASTING CORPORATION and CBS FILMS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

—o—

CERTIFICATE OF SERVICE

I, EUGENE L. GIRDEN, a member of the Bar of this Court, hereby certify that on the 23rd day of December 1975, three copies of the Brief for Respondents in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to Counsel for Petitioner: Alan T. Dworkin, 809 Industrial Bank Building, Providence, Rhode Island 02903, Leonard Michaelson, 300 Industrial Bank Building, Providence, Rhode Island 02903, Eugene Gressman, 1828 L Street N.W., Washington, D.C. 20036.

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APPENDIX

JURISDICTION OF UNITED STATES MAGISTRATES

HEARING

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

S. 1283

JULY 16, 1975

Printed for the use of the Committee on the Judiciary

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JURISDICTION OF UNITED STATES MAGISTRATES

WEDNESDAY, JULY 16, 1975

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENT
IN JUDICIAL MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 8:30 a.m., in room 6202, Dirksen Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senator Burdick.

Also present: William P. Westphal, chief counsel, Brian Southwell, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. The matter before the subcommittee today is S. 1283, a bill to further define the jurisdiction of the U.S. magistrates. The subcommittee will also consider printed amendment No. 589, which has been offered to S. 1283.

When I introduced this bill on March 21 of this year at the request of the Judicial Conference, I explained that consideration of this legislation was made necessary as a result of a decision by the Supreme Court of the United States handed down on June 26, 1974, in the case of *Wingo* v. *Wedding*, 418 U.S. 461, in which the Supreme Court interpreted section 636(b) of the title 28 and held that the statutory language employed by the Congress, when it enacted the Magistrates Act in 1967, did not authorize the magistrate to hold an evidentiary hearing in a habeas corpus proceeding brought by a prisoner, but that the statute merely authorized the magistrate to make a preliminary review of a prisoner's petition in order to determine whether an evidentiary hearing should be held by a judge of the court.

In that case, the Chief Justice and Justice White, in dissenting from the majority opinion, suggested that because of the action taken by the majority of the Court, it was in order for the Congress to restate its intentions if its declared objectives are to be carried out.

In my view, the declared objective of the Congress when it passed the Magistrates Act in 1967, was to create in the magistrate a judicial officer who could perform various judicial duties, both in his own right and when authorized by the court in certain cases and proceedings in which the magistrate's work would be under the supervision of the judges.

Congress felt that such an office was necessary in order to assist the judges of our district courts in meeting their responsibility to handle an ever-increasing caseload.

In hearings held by this subcommittee on the Omnibus District Court Judgeship bill in the last Congress, the chief judges of 44 of the

94 Federal judicial districts personally appeared and testified before the subcommittee.

The overwhelming majority of the chief judges who testified stated that the magistrates were of great assistance to the court in handling certain pretrial matters in both civil and criminal cases and were of the greatest assistance to the court in handling petitions brought by prisoners from both State and Federal institutions.

Regardless of the construction that may be given to the Congress' intent in 1967, it is my belief that the magistrate system over the past 5 years has proven to be a valuable part of our Federal judicial system.

It has been proven that magistrates can handle a large variety of pretrial matters which are necessary in the preliminary processing of both criminal and civil cases, in order to get the case ready for trial before a judge of the court.

It is alse clear that the magistrates must have the unquestioned authority to hold evidentiary hearings in prisoner petition cases when such matters are assigned to him by a judge of the court exercising the discretion given to the judge under section 636(b) of the statute.

After introduction of S. 1283, the staff of this Subcommittee, in conference with representatives of the Judicial Conference of the United States, worked out an amended version of the bill which I introduced as printed amendment No. 589. I would suggest that in our hearing today we confine ourselves to the language as set forth in the printed amendment.

Before calling our first witness we will receive for the record copies of S. 1283 and printed amendment No. 589. There will also be included at the end of the hearing record correspondence which has been received from Judge Robert C. Belloni, of the District of Oregon, and from Judge Harry W. Wellford, of the Western District of Tennessee.

[The bill S. 1283 and printed amendment No. 589, follow:]

[S. 1283, 94th Cong., First sess.]

A BILL To improve judicial machinery by further defining the jurisdiction of United States magistrates, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 636(b) of title 28, United States Code, is amended to read as follows:

"(b) (1) Notwithstanding any provision of law to the contrary, a judge may designate a magistrate to hear and determine, subject to review as hereinafter provided, any pretrial matter pending before the court except motions which are dispositive of the litigation, the disposition of which the magistrate may recommend, but not order. A judge may also designate a magistrate to conduct evidentiary hearings and make recommendations for the disposition of applications for post-trial relief made by individuals convicted of criminal offenses and prisoner petitions challenging conditions of confinement. Upon timely request, as fixed by local rule of court, by any party who has appeared before the magistrate, either personally of by submission of affidavits or brief, the court shall hear de novo those portions of the report or specific proposed findings of fact or conclusions of law to which objection is made.

"(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

"(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

"(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.".

[S. 1283, 94th Cong., First sess.]

AMENDMENT Intended to be proposed by Mr. BURDICK to S. 1283, a bill to improve judicial machinery by further defining the jurisdiction of United States magistrates, and for other purposes, viz: Strike everything after the enacting clause and insert in lieu thereof the following:

That section 636(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) Notwithstanding any provision of law to the contrary—

"(A) a judge may designate a magistrate to hear and determine, any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant to suppress evidence in a criminal case, dismiss or to permit maintenance of a class action, and to involuntarily dismiss an action for failure to prosecute or for failure to comply with an order of the court. A judge of the court may rehear any pretrial matter under this subsection where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subsection (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) of this subsection, with the clerk of the court, who shall forthwith mail a copy to all parties. Within twenty days after being served with notice of the filing, any party may serve and file written objections to such proposed findings and recommendations, together with a motion applying to the court for action on such proposed findings and recommendations. The motion shall be determined by a judge of the court who may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

"(2) A judge may designate a magistrate to serve as special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States District Courts.

"(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

"(4) Each district court may establish rules, consistent with this subsection (b) pursuant to which the magistrates shall discharge their duties.".

I will now call Judge Charles M. Metzner of the Southern District of New York, who is chairman of the Judicial Conference Committee on the Magistrates System.

Welcome to the committee, Judge.

STATEMENT OF HON. CHARLES M. METZNER, JUDGE, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Judge METZNER. Mr. Chairman, my name is Charles M. Metzner, I am a judge in the U.S. District Court for the Southern District of New York, located in New York City. I am presently chairman of the Judicial Conference Committee on the administration of the Federal magistrate system.

I have been chairman since 1971 and a member of the Committee, since its formation in 1969.

I appreciate the opportunity to appear today in support of S. 1283, to broaden and clarify the jurisdiction of the U.S. magistrates. This is very important legislation for the Federal judiciary. It deserves favorable consideration by the Congress.

Mr. Chairman, the first call on judges' time should be to try cases and hear important matters, such as preliminary injunctions. Our traditional procedures of making the judge available for practically every possible application for relief and every preliminary proceeding in a case can no longer be justified.

The Judicial Conference believes that the greatest possible use must be made of U.S. magistrates if the district courts are to cope with their growing caseloads.

The growth in the size of the Federal judiciary over the last 10 years has been proceeding at a phenomenal rate. On June 30, 1964, there were 289 district judges, with annual combined civil and criminal filings of 98,000 cases.

On June 30, 1974, there were 400 district judges, with combined annual civil and criminal filings of 143,000 cases. With this rate of growth we can expect to require a trial bench of 560 judges 10 years from now, and the annual combined civil and criminal filings of about 200,000 cases.

The Congress has added a number of new fields of litigation creating responsibilities and duties which never existed before. The full impact of this legislation has not as yet been felt by the courts.

The pressure has been compounded with the recent enactment of the Speedy Trial Act. It is mandatory that the district courts make greater use of their magistrates if the guidelines of the bill are to be achieved without further drastically increasing the size of the judiciary.

It is our considered judgment that we cannot continue to cope with this problem by increasing the number of district judges and the supporting staffs of law clerks, secretaries, court clerks, court reporters and other employees, with the concomitant need for huge additional physical space.

The use of magistrates to handle preliminary judicial matters in Federal litigation enables district judges to devote more time to the trial of cases, the writing of opinions and other essential functions.

The Federal Magistrates Act was signed into law in October of 1968, and the magistrate system was implemented in all Federal courts by July 1, 1971. We thus have 4 years of experience in the Federal judiciary with this system of new Federal judicial officers.

The Act was designed both to create an upgraded lower tier of judicial officer, and to cull from the evergrowing workload of the U.S. districts courts matters that are more desirably performed by a lower tier of judicial officers.

The jurisdictional provision of the Federal Magistrates Act, found at section 636 of title 28, United States Code, contains two basic grants of authority to U.S. magistrates in subdivisions (a) and (b).

Under section 636(a) magistrates are given authority to perform all the duties of the former U.S. Commissioners, such as administering oaths; taking acknowledgments, affidavits and depositions; issuing arrest and search warrants, setting bails on persons charged with criminal offenses; and issuing commitment and release orders with respect to the custody of the persons so charged.

They may also conduct trials of minor offenses where designated by their appointing district court. The term minor offense is defined in section 3401 of title 18, United States Code, as a misdemeanor punish-

able under the laws of the United States, the penalty for which does not exceed imprisonment for a period of 1 year, or a fine of not more than $1,000, or both.

Mr. Chairman, the language of the draft bill, S. 1283, does not affect the jurisdiction given to magistrates under section 636(a).

I should point out, however, that the Judicial Conference has requested Congress separately to raise the fine limitation set forth in 18 U.S.C. 3401 from $1,000 to $5,000 and also to eliminate the requirement that a defendant in a petty offense case consent in writing to trial before a magistrate, rather than a district judge.

S. 1283, rather, is confined to section 636(b) of Federal Magistrates Act. The present section permits United States district courts to delegate additional duties to magistrates, including the preliminary review of prisoner petitions, the conduct of pretrial and discovery proceedings, service as a special master, and such additional duties as are not inconsistent with the Constitution and the laws of the United States.

Under authority of section 636(b), magistrates are presently performing very important judicial duties for the district courts around the country and are expediting the disposition of criminal and civil cases.

Magistrates are now used to assist the judges by performing additional duties in civil and criminal litigation in virtually all districts where there are full-time magistrates.

During the fiscal year 1974, the magistrates filed written reports and recommendations on 7,455 prisoner petitions. They conducted 15,743 civil pretrial conferences, reviewed 5,985 discovery and other motions in civil cases, submitted 367 special master reports to judges, and filed reports and recommendations in 277 social security appeals.

Magistrates also conducted 6,313 pretrial conferences in criminal cases, and conducted 13,996 arraignments under rule 10 of the Federal Rules of Criminal Procedure.

Although most district courts have delegated important duties to magistrates, a wide diversity of view has developed among the courts of appeals as to the appropriate scope of duties which may be delegated under the present section 636(b).

Some of these decisions appear to limit the use of magistrates, contrary to the original intent of the Congress. The Supreme Court, in the recent case of *Wingo* v. *Wedding*, 418 U.S. 461 (1974), held that a U.S. magistrate was not empowered to conduct an evidentiary hearing in a habeas corpus case.

The decision was limited to a narrow statutory question, however, and did not resolve several outstanding jurisdiction issues.

The Judicial Conference believes that it is time to seek legislative amendment to section 636(b). Significantly, the Chief Justice, in his dissent in the *Wingo* case, expressly invited the Congress to clarify the statute:

> In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intention if its declared objectives are to be carried out.

The Comptroller General submitted a report on the magistrates system to the Congress on September 19, which recommended in part that the Congress further define the authority of magistrates

and expand the trial jurisdiction of magistrates to include most misdemeanors.

At the urging of Chief Justice Warren E. Burger, a committee was appointed, of which I was a member, to observe the use of masters in the English judicial system.

The report of the committee demonstrates the ability of masters to handle virtually all civil pretrial matters in England. We are confident that the English experience can be successfully duplicated in this country through the use of magistrates.

Essentially the magistrate is a judicial officer. He discharges his responsibilities qua magistrate, and this is made clear in the proposed subsection 636 (b) (1). Any other responsibilities, such as a special master assignment, are set forth in a separate subdivision of section 636 (b).

It was the lack of clarity in expressing this concept that led to many of the judicial decisions limiting the use of magistrates contrary to what appeared to have been the intent of Congress.

In any event, the proposed language clarifies what we think was the original intent in creating the Office of Magistrate and expands his duties.

Our experience over the past 4 years has shown that magistrates are fully capable of discharging the duties envisioned by this extension of jurisdiction.

Mr. Chairman, if S. 1283 is enacted into law, the magistrates in every judicial circuit will be permitted to play a major role in expediting civil and criminal litigation in the district courts.

They will be empowered to conduct all pretrial conferences and hear any pretrial motion or matter in the district court. This includes dispositive motions such as for summary judgment in a social security case or to suppress evidence in a criminal case, as well as nondispositive procedural and discovery motions. They may conduct evidentiary hearings in prisoner cases. They may continue to serve as special masters and perform any other duty not inconsistent with the Constitution and laws of the United States.

Proposed subsection (b) (2) would allow a magistrate to serve as a special master in any civil case filed in the district court where the parties consent to the reference.

Under the proposal, a magistrate could hear and determine any pretrial matter that is not essentially dispositive of the litigation. A review of the determination may be had on a showing that it is clearly erroneous or contrary to law. In the dispositive area of pretrial proceedings, habeas corpus, and prisoner petitions, the magistrate would hear the matter but could only recommend a disposition to a judge.

This limitation has been provided to avoid the possible constitutional objection that only an article III judge may ultimately determine the litigation. Although there is respectable authority that finds congressional power sufficient to avoid any constitutional objection, we do not feel that it is necessary at this time to raise the issue.

A review of the magistrate's recommendations may be requested by a party finding himself aggrieved, and the court may accept, reject, or modify the recommendation.

The inherent justification of S. 1283 is evident when we consider the huge proportion of civil cases which are disposed of without meaningful intervention by judges. The figures for the fiscal year of

1974 show that only 8,382 cases were disposed of by court or jury trial out of a total of 96,701 civil cases.

This amounts to 8.7 percent. There is no doubt that many more cases are disposed of without trial because of the active intervention of the court.

However, even the most liberal experience would show that these would not rise to 25 percent of the total. These 25 percent would continue to require meaningful judge intervention, but the remaining 75 percent would not be there for his attention under any circumstances. Finally, we see in this proposal a start in reducing the enormous amount of paperwork now required by our procedures. There is no reason why a pretrial conference may not eventually be heard by a magistrate and counsel with the only piece of paper being the resulting order entered to guide counsel toward the ultimate trial, if one is necessary.

This is exactly what we found happened in the English system when the master conducted pretrial a conference.

Mr. Chairman, I would suggest several amendments to the proposal, to which these remarks are addressed. Since the listed exceptions in subparagraph (A) of subsection 636 (b) (1) refer to matters which are or may be dispositive of the litigation, I would add a motion to dismiss the complaint.

A motion to dismiss for failure to state a claim or for lack of subject matter or personal jurisdiction is as dispositive as one for summary judgment or judgment of the pleadings.

On the other hand, I would omit a motion to dismiss an action for failure to prosecute. This is essentially a docket clearing procedure which does not need judicial supervision.

The docket entries will clearly reflect the lack of activity in the case, and the magistrate should be empowered to dismiss without further ado or upon such conditions as the facts justify.

Finally, the proposal provides a detailed procedure in subparagraph (C) for reviewing recommendations by a magistrate in matters sent to him pursuant to subparagraph (B). I am not referring to the standard of review—only the steps to be taken to obtain review. No such detail is provided for matters covered by subparagraph (A). There the procedures to review matters under subparagraph (B) should also be left to local rule. Frankly, rigidity in this area is counterproductive.

The bill provides that each district court may establish rules for the discharge of a magistrate's duties. This requirement is found in the existing law. Experience has shown that districts have different local procedures based on established practices and needs; and all districts do not use magistrates in the same fashion. Local rules permit a court to adapt the system to best serve its local needs.

Thank you for the opportunity of appearing here today. If there are any questions, I shall be glad to try to answer them.

Senator BURDICK. Thank you, Judge, for your contribution this morning.

In my opening statement, I referred to an amendment that had been filed for this bill. Have you seen the content of that amendment?

Judge METZNER. I have seen the content of the printed amendment, yes.

My remarks were addressed to the statement which I think appeared on July, or June 27, if my date is correct. And that is what I was addressing these remarks to.

Senator BURDICK. Do you think that the amendment will take care of the objections that you raised?

Judge METZNER. I think that the amendment which I had an opportunity to talk with Mr. Westphal about this morning would take care of the main objection.

I had one other that we have not had a further opportunity to talk about. We might have later, about the procedural situation.

Senator BURDICK. Well, I will let you and Mr. Westphal talk about it now.

Judge METZNER. Fine.

Mr. WESTPHAL. Let us take your suggested amendments in order, if we could. Your first suggestion is that there should be a change in those motions that are expressly excepted in subparagraph (A).

And your suggestion is that we add a motion to dismiss the complaint, and you give three examples of types of motions that you think should be expressly excepted.

The first example you give is a motion to dismiss for failure to state a claim upon which relief can be granted. Second you give a motion for a lack of jurisdiction over the subject matter, and third, you give a motion to dismiss for a lack of jurisdiction over the person.

And you suggest that they should be, all three of them, added to the list of motions that are expressly excepted from the magistrates power to hear and determine as given under subparagraph (A) of the section.

Now, I handed you briefly a copy of a proposed amendment, which, Mr. Chairman, I would like to have included in the hearing record at this point.

Senator BURDICK. Without objection.

[The information referred to follows:]

"Subsection (b)(1)(A) of sec. 636(b) of title 28 United States Code is amended to read as follows:

"(b)(1) Notwithstanding any provision of law to the contrary

"(A) A judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted in which motion matters outside the pleadings are presented, and to involuntarily dismiss an action for failure-to-prosecute or for failure to comply with an order of the court. A judge of the court may rehear or redetermine any pretrial matter under this subsection where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

Mr. WESTPHAL. And in our discussion this morning of that language, you will note that the underscored language would include, as an excepted motion "a motion to dismiss for failure to state a claim upon which relief can be granted, in which motion, matters outside the pleadings are presented."

Now, that language would include only those motions to dismiss for failure to state a claim which are considered upon matters presented either by affidavit or by deposition or by interrogatories outside of the pleadings themselves.

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In our colloquy this morning, prior to the time that this hearing started, you indicated that that type of a motion is, under the language in rule 12(b), expressly deemed to be the equivalent of a motion for summary judgment.

Your suggestion in our discussion this morning was that we should not limit it firmly to that type of a motion, but that we should include in this exception any motion to dismiss for failure to state a claim upon which relief can be granted, whether matters outside the pleadings are considered or not.

Is that basically the suggestion?

Judge METZNER. That is right, Mr. Westphal.

Mr. WESTPHAL. I think it would help our hearing record if you could expand a little bit on your reasons why you feel that this exception should not be limited only to those motions in which matter outside the pleadings are considered.

What has been the experience that you yourself have had in your particular court in the Southern District of New York?

Judge METZNER. The motion to dismiss for failure to state a claim upon which relief can be granted as referred to in rule 12(b)(6), has been used more and more in the complicated litigation that we are now facing.

As you know, over the last 10 years, the number of cases brought under the Securities Act of 1933 and 1934 has greatly increased, and especially in the last year with the stock market gyrations.

The court is really deluged with that type of litigation today: mergers, consolidation, cases where corporations have gone public, as we call it, now are going private. The complaints are not the short form complaint envisioned by the Federal rules. They are long form complaints. They are running 20, 30, 40 pages. Similarly, you find in massive antitrust litigation, the complaints are long.

In every one of the cases I have assigned to me, and I think it would be the experience of my colleagues throughout the country, who have the same type of litigation, motions to dismiss are regularly made, to dismiss for failure to state a claim upon which relief can be granted.

Our court of appeals has reviewed the district court determinations in such matters on the grounds that they are setting forth law for the future and consequently we look upon these motions as just as important as motions for summary judgment.

I think that the statistics will show, and I would like to check them, and furnish them to you, if I may, that there is an increase in motions made in the Southern District of New York to dismiss a complaint for summary judgment. This is raising important legal issues, which we think are just as important as judgments for summary judgment.

Motions for summary judgment, frankly, are easier motions to decide than a motion to dismiss a complaint. In a motion for summary judgment you merely need to show that there is some issue to be tried.

You can go through those papers and the affadavits and if there are depositions or answers to interrogatories, you can find some issue which is raised requiring a determination, and the motion must be denied.

Whereas, in a motion to dismiss the complaint, we find that you spend a tremendous amount of time and legal research to come up with what we hope will be a direct answer at the nisi prius level.

Mr. WESTPHAL. If we assume for the purposes of our discussion that your argument is as persuasive upon the subcommittee as it is upon me, would your point be taken care of if we were to delete from that new language in the draft of the proposed amendment in subparagraph (A), the language after the word "granted" so that this exception would be as broad as it can be, in that it would read "to dismiss for failure to state a claim upon which relief can be granted."

Judge METZNER. Yes, it would.

Mr. WESTPHAL. Now, then, your second suggestion is that there be excepted from the power of the magistrate to hear and determine pretrial matters, motions to dismiss for lack of jurisdiction of the subject matter, or for a lack of jurisdiction of the person.

Now, these are motions which are essentially based upon a legal question with very limited fact questions involved in the consideration of that motion. Is that not basically true?

Judge METZNER. I think that would be true of a motion to dismiss, for a lack of subject matter jursidiction. I do not think it would be true of a motion to dismiss for a lack of personal jurisdiction.

Frequently, it is necessary to have testimony taken as to proper jurisdiction of the defendant.

Mr. WESTPHAL. But the fact question involved there is relatively simple. The marshal either got service on the person, or some kind of substitute service of the individual authorized by statute or there was service by publication if allowed by law. And while there may be some nuances in the facts, it should be a relatively simple question for a magistrate to determine. Especially since in many of these types of cases there are well-established judicial precedents.

Judge METZNER. I think that is true, Mr. Westphal.

Mr. WESTPHAL. In any event, once the magistrate has heard and determined a motion to dismiss for want of jurisdiction in the subject matter or of the person, an aggrieved party can always ask for a rehearing or redetermination by the district court judge. Is that not true?

Judge METZNER. Under your proposal, if these two are not included, then there would be a review under a clearly erroneous and contrary to law standard.

Mr. WESTPHAL. And is that not acceptable?

Judge METZNER. I would think that both would be satisfactory.

Mr. WESTPHAL. Your second suggestion for an amendment to the language contained in the printed amendment is to delete on line three of page two the inclusion of a motion to dismiss for failure to prosecute.

You suggest that this is largely a routine motion where the clerk's docket itself indicates that there has been a failure to prosecute.

The draft language which I handed to you this morning does include your suggestion for deleting the words for failure to prosecute.

Judge METZNER. That is right.

Mr. WESTPHAL. And that would take care of your suggestion there?

Judge METZNER. Right.

Mr. WESTPHAL. Now, Judge Metzner, your last suggested amendment relates to the fact that in subsection (C) of the printed amendment there is a detailed procedure for review of the proposed findings and recommendations made by the magistrate, pursuant to his au-

thority under subsection (B), you object to the procedure spelled out there, as too rigid, and that it does not permit sufficient flexibility.

And you suggest, rather than having the statute specify the procedure, that this is a matter that should be left by the Congress to local rules of court.

That raises several interesting questions. In the first place, I think that you will recognize that the procedure specified in subsection (C) is essentially that procedure that is specified in rule 53 in order to obtain review of a proposed finding and report of a special master.

You recognize that?

Judge METZNER. Certainly.

Mr. WESTPHAL. So that if this is too rigid in our amendment to this bill, then it necessarily must be too rigid in rule 53 (b). Is that not true?

Judge METZNER. Well, you are dealing with essentially a different problem. In rule 53, you are dealing with a special master, who is a non-judicial officer, a lawyer outside of the system. You are dealing with hearings outside of the system. You are dealing with bringing before the court a report of the special master for judicial approval.

When you are talking about magistrates, you are talking about people within the system, within the very same building. I can best give you an example as to how we do it to show you how simple it is.

Copies of the magistrate's report are simultaneously sent to the judge and to counsel by the magistrate. That report has a concluding paragraph in it which says that if you have any objections to this report, you shall file them with the court within ten days.

These papers are then taken by my secretary and held for 12 days. We do not hold them to the strict 10-day rule. If any objections come in, she brings the papers in to me and I review them and decide it. If no objections come in, I merely sign the magistrate's order.

It is as simple as that. The clerk does not get involved in it. The magistrate sends them directly to the judge, the parties are notified to file their papers directly with the judge and when it is all finished, it is brought down to the clerk's office, where the papers are docketed and filed.

Now, we do that because it is simple for us. We would not do it with special masters, because we are dealing with somebody outside of the system, when we are dealing with a special master. True, he is appointed by the court, he is a private attorney, he is getting paid a fee by the parties, and more formality is needed.

But, frankly, in this area, I think that you will find, and as I say, I can only talk for my court, but there are 10 members of my committee, so that each judicial circuit is represented on the committee, and they have all agreed that they find that the more procedure fixed by local rule is best.

Each district seems to have different problems. The lawyers are used to working one way and the judges are used to the same procedures so that North Dakota could be entirely different from the Southern District of California.

Mr. WESTPHAL. The same might have been true with reference to a special master under rule 53, except for the fact that back in 1937 or 1938, they specifically tied down the procedure which should be followed in order to take exceptions to the report of a special master.

Had they not done that, you could have had a different procedure grow up in every one of the districts, as you suggest that we allow to be done now, under this power given the magistrates.

Judge METZNER. You are permitting it in the so-called nondespositive area. There is no provision in Senate 1283 for procedures for reviewing what we would call the nondispositive motion, that is being left to local rule. And we see no reason why the so-called dispositive ones should not also be left to local rule.

Mr. WESTPHAL. May I suggest this reason then as being the intent behind the draftsmanship of that structure and the difference between the review accorded under subparagraph (A) matters, that is in the pretrial motion, and the review specified herein for review of the so-called dispositive matters which are included in subparagraph (B), the difference being this: In subsection (A) the magistrate is given the power to hear and determine. He is a judicial officer. Intent is that he shall have an adjudicating power that is final except for such review as the judge, in his discretion may want to give it after the parties make a motion asking for that review, claiming that the magistrate's determination was clearly erroneous, or contrary to law.

Now, what the intent is, and I think that we were all in agreement on that, is that that power to hear and determine should not extend to the so-called dispositive motions, which are motions for summary judgment, to dismiss an indictment, to dismiss an action, and all of these other kinds of dispositive motions. Including evidentiary hearings in prisoner petition matters.

Now, they were excluded from the magistrate's power to hear and determine and they were included in that part of the statute which would give to the court the discretion to give that type of case to a magistrate to take evidence if need be and to fully hear and consider the motion and to then make proposed findings and recommendations to the judge of the court, which is basically the same thing that a special master does.

The intent clearly is that because these more important motions, about which both the bench and the bar are a little bit sensitive at this time, about having a magistrate handle, that we should have a different method of review which is on this exception basis, specified in the statute.

Now, that is one reason why the printed amendment specifies a specific procedure for obtaining review of dispositive orders. But, it does not have any procedure for the more routine pretrial matters determined by the magistrate.

And the advantage now, of having that difference in particularly of specifying the procedure under subsection (C) is that the bar of the country will know exactly what procedure they have to follow if they feel aggrieved by any proposed findings or order. And it would be the same procedure in all 94 districts.

There will be this advantage of uniformity to it. And, what I think is most important, it removes all doubt from the minds of the lawyers as to what procedure they have to follow when they feel aggrieved by that type of an order.

Now, you accept that as a reason for the distinction between the two?

Judge METZNER. I really cannot, Mr. Westphal, because I think we are talking more about form, than we are of substance. I think

that it is more important that in each district the matters proceed as those districts over the years have found to be most efficient for their particular district.

Second, you find very few, percentage wise, lawyers practicing in more than one district.

Third, we in our district, and I am sure it must be true in other districts throughout the county, do not permit an out-of-district lawyer to proceed in the court without designating local counsel, whose job it is to tell the attorney of record, what the procedures are in that district.

I am sure that this is a much easier and more efficient way of doing it. Now, let me give you an example. You recall, when we first talked in May, there was a 10-day time for the clerk——

Mr. WESTPHAL. Let us not get into the 10- or 20-day matter because that is a separate amendment.

Judge METZNER. This is part of the problem of a stratified procedure.

Mr. WESTPHAL. I understand, but we can take up the difference between 10 days or 20 days after we finish our discussion of this point that we are on now. May I suggest on the point which you raise of how review is obtained under matters decided under subparagraph (B) that that be left to local rules. One of the problems that I see is that the local rules of the district courts are not very well promulgated. They are not published in West's Annotations, with any degree of accuracy. If they are published in there, it takes a year and a half for West's to pick up any change or amendments.

It may be very easy in the Southern District of New York, for almost any lawyer who comes before your bar to know what your local rules are and to pick up a pamphlet about them.

But it is quite a different problem out in Minnesota, where I practiced. My practice got me into courts in North Dakota and in South Dakota and in Wisconsin and in Iowa. It is an awful problem for a lawyer in those parts of the country to know just what is the procedure specified in the local rule of a federal district court, even if it is his home court, so to speak. So, I think that there is a great advantage to the bar of this country. I think Congress would be doing a great favor to the practicing lawyer in this country by specifying an exact procedure which he is to follow if he wants to obtain a review of a magistrate's recommended disposition of one of these very important matters. Congress, by enacting this legislation, is saying to 400 judges in this country in 94 districts, you have the discretionary power to allow the magistrate to hear that.

Now, if you are going to leave some things to local discretion, I do not think that the procedure to obtain a review of that is a matter that we should leave to local discretion, because it would be too much variance from district to district.

One of the purposes of the Federal Rules of Civil Procedure is to achieve a degree of uniformity. Now, if we are going to allow local courts to specify the size of the juries in civil cases, under local rules, if we are going to allow them to specify what little nuances of procedure there will be in obtaining review of these things, we are losing some of this uniformity that we have started out 35 years ago, or 37 years ago to try to get.

Judge METZNER. In your last example, the move to a six-man jury was done by local rule by Judge Devitt in Wisconsin, was it not?

Mr. WESTPHAL. Judge Devitt in Minnesota. That is the very point.

Judge METZNER. And it spread throughout the country, and I think we are all using it. But there are a number of magistrates who are here today. I do not know which ones are going to testify, but you might ask them as to their feeling. I can only give you my feeling, and actually, it is not just my personal feeling; it is the feeling of the committee.

As I say, the committee has 11 members, so each of the 11 circuits are represented on the committee, and they all felt that this was the best way to do it. I cannot say any more than that, Mr. Westphal.

Senator BURDICK. Was that unanimous?

Judge METZNER. Yes.

Mr. WESTPHAL. Now, on the matter of a procedure specified under subsection (C), whether the time within which a party must take exception to a proposed report of the magnistrate should be 10 or 20 days. All I can say, Judge, is that our original draft of th s revision had 10 days in it. In the meeting in May to which you referred, when you and I and Judge Galdy and Judge Winter sat down and discussed this very thing, as I recall, three of you were unanimous in suggesting to me that 10 days were too short.

Judge METZNER. I accepted, Mr. Westphal. Judge Winter was the one that carried the burden on that, when he said in Colorado, you could not rely on 10 days delivery of the mail.

Mr. WESTPHAL. Sir, we decided in the final language that was introduced, in the printed amendment by the chairman of this subcommittee, that we would go to the 20-day time limit, as desired by Judge Winter.

Now, I think there is a feeling that we should go back to 10 days.

Judge METZNER. No, I am sorry. My comment of the 20 days before was in the area of a rigid procedure that you must do it this way, whereas some districts may feel that 10 days is sufficient, and some may feel 20. I had no views on the 10 or 20 days, specifically. I have heard that there are judges who feel that 20 days is too long, that it should only be 10. On the other hand, I heard Judge Winter say to you that 10 days was not sufficient in Colorado, so in that area, I really have no point of view, except that I suppose retreating to my original position, is it not better to let each district do it as is best for their procedures?

Senator BURDICK. Judge, would you take 15?

Judge METZNER. I always compromise down the middle. I really have no feeling on 10 or 20, per se, or 15.

Mr. WESTPHAL. Well, Judge Belloni, in the statement he filed with the subcommittee, or I believe, a letter transmitting it, said that on second thought, he thought that 20 days was too long, even on these important dispositive motions, and that, for the sake of uniformity if nothing else, we should try to keep it at the same time limit, as in rule 53, as it started out originally. So that if a time limit is to be specified, would you agree that 10 days is preferable to 20 days?

Judge METZNER. I personally would favor 10. I do not know if the section says within 20 days after being served with notice of the filing. Service is that date of mailing, and if you mail on the 7th, and it happens to be a Friday, and because of the way mails are delivered today, you do not receive it until the following Tuesday or Wednesday, you have a pretty short time to come up with objections in a serious matter, such as summary judgment or dismissal of a complaint.

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Mr. WESTPHAL. But in any event, Judge, the court has, under rule 6, the inherent power to extend any time limit such as this. And if you have a matter of that importance, and if 10 days is too short, then it seems to me that the magistrate can, at the end of his proposed order that he sends to the parties, state that the time specified is extended for an additional period of days. He can just start out that way if he foresees it, and I am sure that if any counsel gets caught, he could get an extension of time quite easily by a phone call or something else.

Judge METZNER. Oh, yes. In fact, I think I indicated in my remarks that, while the magistrate's report would say that you have 10 days in which to file objections, my secretary does not give me the papers until 12 days. Automatically, she adds 2 days on for late delivery, and so on. And I do not think anybody is going to be tight in that area. Except my problem is that when you write it into a statute, sometimes things get more rigid than when you do not have the procedures set forth, and you can have this ease of procedure that I have indicated.

The magistrate, if he says in his report that you shall have 15 days to answer, he is, in effect, then, applying a local condition time, rather than the statute time. And I suppose that that is essentially what I am pleading for, in allowing the local rules to fix the procedure.

Mr. WESTPHAL. My question is suggesting that the magistrate would not routinely extend the time to 15 days. unless he had a district in which the mail service was so bad, as Judge Winter claims it is out in Colorado, that he would just put out a standing order that would be 15 days. Now, I do not know that that problem pertains in every district. But in any event, the court has the power to do it.

I do not want to extend this, because neither you nor I can resolve this question. It will have to be resolved in subcommittee, but just so that we can get the question posed, the standard, or procedure for review recommended by the Judicial Conference in their language, which was in the original bill, 1283, which was introduced by request, is as follows:

> Upon timely request, as fixed by local rule of court by any party who has appeared before the magistrate, either personally or by submission of affidavits or brief, the court shall hear, de novo, those portions of the report or specified findings of fact or conclusions of law to which objection is made.

I would suggest, Judge Metzner, that the choice for the subcommittee is to decide which procedure in this area serves the interests of the bar and the bench alike, that which you claim to be a too rigid procedure, specified in the printed amendment language, or that which I suggest is too vague and indefinite language employed in the Judicial Conference recommendation, because under your language you will always have a question of what is the time limit. They will always be dependent upon local rules, and there will be no advantage of uniformity. You have the further question of, whether a party who submits an affidavit as a friend of the court is also one who can object. And you also have the question involving the use of de novo. So I think that the question for the subcommittee has got to be just that simple: is one too rigid, or is the other too vague? What best serves the interests of both the bench and the bar, in order to have an effective and efficient administration of justice?

Judge METZNER. May I add something for the record? I have taken the liberty of amending subparagraph (C), as I think it would conform with my provision and suggestion. May I read it into the record, so that you will have it before you.

Mr. WESTPHAL. Certainly.
Judge METZNER [reading]:

Subparagraph (C). The magistrate shall file his proposed findings and recommendations under subparagraph (B) of this subsection with the court, and shall forthwith mail a copy to all parties. Any party may serve and file written objections to such proposed findings and recommendations as provided by the rules of the district court. The judge of the court may accept, reject or modify in whole or in part the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

Now, that is my version of what I am urging.

Mr. WESTPHAL. The record then will contain three choices for the subcommittee, and you do not have that language printed—is that just hand-drafted now?

Judge METZNER. Hand-drafted on the plane coming down last night, but I will type it up and send it to you, Mr. Westphal.

Mr. WESTPHAL. Well, I wish that we had it typed up. Then we could have some colloquy on it. I did not catch it as you dictated it there.

Mr. Chairman, I have just a couple of short questions, and then I will be finished with Judge Metzner.

In your statement, you suggest that it would be desirable to have the petty offense jurisdiction of the magistrate expanded to include offenses punishable up to a fine of $5,000. In view of the fact that there is now pending before the Senate a bill known as S. 1 which would revise practically all of title XVIII and redefine all of the punishments and the names and classifications of some of the offenses, do you not think that it is desirable for the Congress to wait to see what happens to S. 1 before any attempt is made to alter that provision?

Judge METZNER. The only reason we asked that it be put in, Mr. Westphal, was that we were told that S. 1 was sort of floating around, and was not being pinned down, and we thought that perhaps this could be done more promptly, in an easier fashion. But obviously, it is the Congress' wish as to how they would like to do it.

Mr. WESTPHAL. The other problem was that the Judicial Conference recommended a bill which simply proposed to strike $1,000 and insert in lieu thereof $5,000, and when we had a computer printout of every offense that was punishable by up to $5,000, we found, No. 1, that you could not even get an accurate list of every offense that fell within the $5,000 category; and secondly, that that list included a lot of offenses which there may well be some policy question about as to whether you want to give jurisdiction over those offenses to a magistrate, or whether you want them to be retained within the jurisdiction of the court judge.

But in any event, it would seem to me that it is not easy to accomplish that kind of a change.

Judge METZNER. I suppose that more and more we are coming across cases—I had one involving a boat landing in a navigable stream, and the fine was more than $1,000, and this poor fellow had to go through a whole formal procedure in order to pay a $2,000 fine.

But I think that this is a matter of policy for the Congress, and all we can do is urge our position.

Mr. WESTPHAL. Judge, on page 5 of your statement, you suggest that "most of the district courts have delegated to magistrates the discretionary duties under section 636(b)." We did a little research

looking at the 1974 statistics, and it is rather interesting that there are 12 districts in the country where the court has not assigned any criminal case conferences, motions, or anything else under 636(b) to their magistrates. There are 13 districts where they have not used the magistrate for any kind of a civil motion, or pretrial conference of any kind. And there are 13 districts where they have assigned less than 10—most 1 or 2 cases a year—to the magistrate in that area. And yet some of these districts that are included are districts which have, through the Conference and otherwise, come to the Congress and said that they are so busy that they need additional judges. And yet they are not making any use of the discretionary authority of the magistrate, under section 636(b).

I could name a few of them for you: Northern and Southern Districts of Indiana, Eastern District of California, the Northern District of New York, the Middle District of Pennsylvania, the Eastern District of North Carolina, the Eastern and Western Districts of Virginia, and the Northern District of Florida.

Now, my question to you is, do you have any suggestion as to how these courts, and some others, who make very little use of the magistrates, can be made to realize that the magistrate is intended by the Congress to be an additional officer who can be of great help to the judges in the process and business of the court. What suggestion would you have?

Judge METZNER. Mr. Westphal, thank you for asking the question, because I am able to say that I think we have made steps in that direction. At the meeting of the Judicial Conference last March, my committee, in addition to this proposal that we are discussing here today, pointed out to the Conference that there are such districts that are not making use of the magistrates. In fact, in our report covering the proposal we are discussing today, we pointed out what you said, that the judges were coming before the Congress asking for increased help, and that your committee here has constantly asked, how are you using magistrates? Are you using them fully, and utilizing them, as they should be utilized?

Consequently, my committee asked the Judicial Conference for permission to circularize all of the district judges again, enclosing a suggested checklist of duties that could be assigned to fulltime magistrates, and urging that the judges take full advantage of the magistrates. The letter and proposed checklist, I think, were sent out in May.

Now, of course, it is a little bit too early to find out whether we have been successful or not. However, the attitude of the Conference conveyed to the chief judges of the circuits and to the district judges who sit on the judicial conference, that magistrates should be used to the fullest. I would think that it would be a duty of the chief judge of the district or certainly the chief judge of the circuit to convey this attitude if it is brought to his attention if there are certain districts within that circuit which are not using the magistrates to the fullest.

I do know that in some districts they say, we would rather use magistrates for civil matters and not use them for criminal matters. In another district you might find, we would like to use them for criminal matters, but we would not use them for civil matters. My personal reaction in that area is, that is well and good, but if you

cannot keep abreast of your docket, then you had better use the magistrate to the fullest extent. But if you have no complaint about the docket condition, and they are not coming before you for additional judicial help, then I personally would say, fine. You are using your magistrates as you see fit to best carry out your responsibility.

But once they come before you for more help, or once we find, within the Conference, that the dockets are falling behind, then I think we will turn to them and say, now, you have been told this, you have received these communications, you have received the suggested checklist, go use them.

Mr. WESTPHAL. I have no objection or question in my mind about a court that says, we would rather use them in the criminal area, or in the civil area rather than in the criminal. But I cannot understand why we have so many courts where they say, we will not use them at all, except for the old commissioner-type of hearings.

Judge MEIZNER. Well, one district that you mentioned, that I personally know of is Indiana, where the sixth circuit has been very restrictive in their determinations as to how you can use a magistrate, and the judges are a little leery in view of the existing decisions by the sixth circuit, to use magistrates. And I think that once this proposal of yours is passed, you will find a different attitude. For example, Judge Nolan is a member of my committee, and he wants to use it, but he is told by committees that the seventh circuit seem to put a damper on the use of them. Consequently, we do not.

Mr. WESTPHAL. I hope this legislation will clear that up.

Thank you, Mr. Chairman.

Senator BURDICK. Thank you, Judge.

Our next witness is Mr. Morey L. Sear, U.S. magistrate, U.S. District Court, in New Orleans.

[The prepared statement of Mr. Morey L. Sear follows:]

STATEMENT OF MOREY L. SEAR, CHAIRMAN, LEGISLATIVE COMMITTEE, NATIONAL COUNCIL OF UNITED STATES MAGISTRATES

Chairman Burdick, distinguished Senators: The National Council of United States Magistrates is honored by your invitation to appear before the Subcommittee on Improvements in Judicial Machinery and testify on S. 1283, which would clarify and expand jurisdiction of United States magistrates.

NEED FOR REVISION

Less than seven years ago this Subcommittee, after lengthy hearings, gave birth to the Federal Magistrates Act.[1] Full implementation of the Magistrate System came three years later, but since that time magistrates have amassed an impressive record. The most recent published statistical report[2] shows that 112 full-time and 411 part-time[3] magistrates disposed of 242,929 judicial matters during the fiscal year ending June 30, 1974. Volume of work continues to increase, particularly in the area of additional duties provided by Section 636(b) of the statute, and as it has, the Judicial Conference of the United States and its staff have responded by increasing the number of full-time while reducing part-time positions.

No one could predict the phenomenal success of the program or its welcomed acceptance by both bench and bar, but almost immediately questions regarding the scope of the duties of these new judicial officers arose, and because the language of the Act was not clear, a diversity of opinion developed among courts of appeal.

[1] Public Act 90-578 (1968), 28 U.S.C. 631, *et seq.*

[2] Annual Report of the Director of the Administrative Office of the United States Courts 1974 tables M-3 and M-4.

[3] Report of the Proceedings of the Judicial Conference of the United States September 19-20, 1974, p. 70.

Finally, on June 26, 1974, in *Wingo* v. *Wedding*,[4] the Supreme Court laid to rest one of the most controversial jurisdictional questions: whether a United States magistrate could conduct an evidentiary hearing on a habeas corpus petition. In a decision based almost entirely on the legislative history of the Federal Magistrates Act, the Court found that Congress had not assigned magistrates the duty to hold evidentiary hearings. But the Court itself did not agree upon what the Congress intended, and in a far-reaching dissent, the Chief Justice invited the Congress "to restate its intentions if its desired objectives are to be carried out." [5]

We are here today to more clearly restate those objectives.

PROPOSED AMENDMENT

Prisoner petitions provide the battleground of only one of the conflicts in appellate decisions. Review of proceedings of administrative agencies on an established record and hearings on motions to suppress and for summary judgment which may be dispositive of litigation are the other areas of principal disagreement.

The bill before you now establishes a clear Congressional intent to resolve these jurisdictional disagreements. The amendment makes academic the objections raised by *Wedding* to magistrates conducting evidentiary hearings in post-trial matters; by *T.P.O.* v. *McMillan* [6] to hearing motions to dismiss or for summary judgment, and by *Ingram* v. *Richardson* [7] to reviewing appeals from rulings of administrative agencies. All are clearly permitted by the language of the amendment.

A major concern of those reluctant to approve references to magistrates was the absence of legislative direction and uniformity of the scope of review references to magistrates should be accorded. The review provided in S. 1283 is consistent with accepted and existing standards of appellate procedure without depriving the district judge of the final decisionmaking power. The clearly erroneous standard of Rule 52a, Federal Rules of Civil Procedure, is adopted for non-dispositive motions, and an assignment of error filed within a prescribed time is required for all other motions. Our only criticism is that the twenty days allowed in 636(b)(1)(C) seems particularly long, especially when considered in light of the time allowed for objection to findings of special masters provided by Rule 53(e)(2), Federal Rules of Civil Procedure.

Some indication of legislative intent must, in our opinion, be given to review of consensual references provided in Section (b)(2) of the Amendment. Reference by consent of the parties has been favorably considered by the Supreme Court for more than 100 years.[8] That same approval was carried into the Federal Magistrates Act evidenced by a staff memorandum of this Subcommittee in April 1966 stating: "The use of magistrates for duties that do not require the employment of an Article III judge, as in cases in which the parties consent to the use of a magistrate, may do much to increase the efficiency of the Federal Courts." [9] Further evidence of this committee's intent is found in hearings on S. 945 [10] dealing with trial of minor offenses by magistrates.

"That it is constitutionally and statutorily permissible to refer cases, with the consent of all parties, for initial decision is clear," wrote Chief Judge Coffin of the First Circuit less than a month ago. But, he continued: "What does not appear at all clear * * * is whether the decision * * * once rendered is by statute subject to very limited review or to review for any prejudicial legal error as required by F. R. Civ. Pro. 53(e)(4)." [11]

The "Jurisdictional Check List" [12] prepared by the Committee on the Administration of the Federal Magistrate System of the Judicial Conference of the United States suggests "[t]he stipulation of the parties in such cases should provide for entry of judgment."

We share that view. The essence of a consensual reference is agreement of the parties, and it seems appropriate that the parties determine for themselves the type and scope of review in each case. Parties should be free to consent to review

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[4] 418 U.S. 461, 94 S. Ct. 2842 (1974).
[5] *Wingo* v. *Wedding*, (*supra*) at p. 2856.
[6] 460 F.2d 348 (7th Cir. 1972).
[7] 471 F.2d 1268 (6th Cir. 1972).
[8] *Hickers* v. *Faucas*, 69 U.S. 123 (1864); *Newcomb* v. *Wood*, 97 U.S. 581; *Kimberly* v. *Arms*, 129 U.S. 512 (1889).
[9] Hearing on S. 3475 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2nd Session, at 14 (1966).
[10] Hearing on S. 945 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong., pp. 246-256 and p. 282 (1967).
[11] *DeCosta* v. *C.B.S.*, —— F. 2d —— (1975) [No. 74-1391, First Circuit].
[12] Annexed as Exhibit A.

by the district judge of both fact and law or of law only as provided in Rule 53(e)(4), Federal Rules of Civil Procedure, but it should also follow that the parties may, if they wish, consent to entry of final judgment by the magistrate with review by the Court of Appeals on the same standard as provided by Rule 52(a), Federal Rules of Civil Procedure.

Experience has taught us that litigants do not want to be put to the expense of an intermediate review. Moreover, judicial economy suggests that parties be permitted to stipulate their own method of review.

Enactment of S. 1283 will, in our opinion, settle the dust of four very fast moving years. It will remove the doubt that has, to this point in time, had a chilling effect upon full utilization and acceptance of magistrates in the judicial system and clarify for both bench and bar the scope of duties that may be assigned to magistrates.

CONTEMPT

While S. 1283 resolves most of the conflicts of judicial decision, it does not resolve some of the practical problems we encounter in performing the duties the Congress has given us.

Control of proceedings conducted by a magistrate in furtherance of the jurisdiction of the district court is difficult in the absence of authority to punish conduct constituting contempt committed in the presence of the magistrate.

The original draft of the Federal Magistrates Act included in Section 636(d) summary contempt power; however, concern was voiced by the Judicial Conference Committee on the Administration of Criminal Law, and the existing procedure which requires a magistrate to certify facts to a judge for determination was substituted.

Contempt powers are not reserved exclusively to Article III judges but are considered necessary in the ordinary performance of judicial functions. Since passage of the Federal Magistrates Act, the Rules of Bankruptcy Procedure, which became effective October 1, 1973, gave bankruptcy judges summary contempt power.[3]

GENERAL PROVISIONS

Some general statement that makes clear the role of a magistrate in the proceedings before him is essential. Such a provision may be found in Rule 52(a) of the Court of Claims, which provides that "The commissioners shall serve as the trial judges of the court to the extent of the authority therefor prescribed by statute and these rules. As such, they shall have the power to do and perform any acts which may be necessary or proper, under the court's orders of reference and these rules, for the efficient performance of their duties and the regulation of proceedings before them."

Another general provision badly needed is one that would provide that reference to "court" and "judge" in certain categories of statutes and rules shall be deemed to include "magistrates". Such a provision would make clear the authority of magistrates to select juries, receive grand jury returns, conduct naturalization proceedings and proceedings under mental health and drug rehabilitation statutes. Because *Wedding* involved such a statute, we assume that the opening clause of the proposed amendment "Notwithstanding any provision of law to the contrary" was intended by the drafters to be broad enough to include "magistrate" where "court" and "judge" are used in statutes and rules to avoid the necessity of having to amend numerous statutes. Nevertheless, we would prefer that the statute be made clearer or the legislative history point out that fact.

SALARY

No group of public servants has suffered more financial hardship than United States magistrates. We are mindful that federal employees generally have been required to wait for too long for salary adjustments, but the salary inequity from which we suffer is unparalleled in government service.

The legislative history of the Federal Magistrates Act and the proceedings before the Judicial Conference of the United States make it quite clear that the salaries of United States magistrates were intended to be on a parity with salaries paid to referees in bankruptcy. Evidence of this intent is found on page 33 of the 1966 report on S. 3475—the Federal Magistrates Act—issued by this very Subcommittee. "The bill sets a maximum salary of $22,500.00 for a full-time magistrate; this figure, which is three-fourths the salary of a district judge is the maxi-

[3] Rule 920.

mum in effect for full-time referees in bankruptcy. We feel that the importance of the magistrates' duties in the Federal criminal process justifies compensation *at least* as great as that of the full-time referee. The maximum for a part-time magistrate is fixed at $11,000.00, the same as that for a part-time referee." (emphasis supplied)

When this Committee's report was written, the salary of a district judge was $30,000.00 and that of a referee "three-fourths" or $22,500.00.

You will no doubt recall that the Federal Magistrates Act was modeled, in large part, on the Referee's Salary and Expense Act of 1946, and lawyers are selected for appointment to both positions on the same basis and standard of qualifications and experience. Each full-time magistrate nominated for appointment by the district judges he will serve is subject to a full background investigation conducted by the Federal Bureau of Investigation similar to that conducted on nomination of Article III judges. Unlike referees, however, magistrates deal in all areas of the law and in addition must be available twenty-four hours a day seven days a week to issue complaints and search warrants, to advise defendants of their constitutional rights in accordance with Rule 5 of the Federal Rules of Criminal Procedure, and administer the Bail Reform Act of 1966.

When the Federal Magistrates Act became effective October 17, 1968, the provisions of law regarding the maximum salaries of referees and magistrates were identical. The salary structure of judges and referees, however, were included within the jurisdiction of the Commission on Executive, Legislative and Judicial Salaries, which reported to the President in January, 1969. At the time the legislation creating the Commission was adopted, the Federal Magistrates Act did not exist, and the Commission's report was submitted to the President fully five months before the magistrate pilot program even began. Certainly there can be no doubt that magistrates are judicial officers and like referees would have been included within the jurisdiction of the Commission had magistrates existed.

As a result of the report of the Commission and Presidential action, Section 40a of the Bankruptcy Act was amended by the Congress, and maximum salaries for full-time referees were fixed at $36,000.00 and for part-time referees at $18,000.00. Congress left the discretion to fix salaries of referees within that limitation to the Judicial Conference. Salaries of district judges were increased to $40,000.00 by the Commission.

At its March 1969 session, the Judicial Conference, acting within its statutory authority, increased the salaries of most full-time referees to $30,000.00 per annum, but only four part-time referees were increased to the $18,000.00 maximum. At that same meeting, the Conference noted the differential in salaries between magistrates and referees and the resulting inequity, and stated its view "that the maximum salaries of magistrates should be on a parity with maximum salaries paid to referees in bankruptcy." [1]

At the March 15–16, 1971, meeting of the Judicial Conference, a salary committee was appointed to study "increases in salaries for clerks of court, pre-trial examiners, referees in bankruptcy and United States magistrates." At the same meeting, the Conference report states at pages 19 and 20: "The Committee recommended that the Conference reaffirm the principle that the maximum salaries payable to United States magistrates should be on a parity with the maximum salaries payable to referees in bankruptcy (see Conf. Rept., March, 1969, p. 31) and that the Director of the Administrative Office be authorized to prepare the necessary amendments to the statute and transmit them to the Congress. The Conference, after full discussion, voted to recommend that the ceiling on the salaries of United States magistrates be removed and that the salaries of magistrates be fixed from time to time by the Judicial Conference after receiving recommendations of the Salary Committee, newly created."

At the October 28–29, 1971, meeting of the Conference, the Salary Committee made its report:

"Judge William H. Hastie, Chairman, reported to the Conference for the Committee on Salaries.

This Committee was established as a result of the action of the Conference at its March 1971 session (Conf. Rept., p. 3), at which time it was resolved that there should be created a committee to study the salary structure of positions in the federal judiciary, such as referees in bankruptcy, magistrates, clerks of court, pre-trial examiners, secretaries to judges and ungraded positions.

After reviewing the recommendations of the committee, the Conference agreed to the following salary structure for ungraded officers of the court, subject where necessary to authorization and the appropriation of funds.

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[1] See Conference Report, March 1969, page 31.

(2) Full-time Referees in Bankruptcy* 75 to 80% of a district judge's salary.
(3) Full-time United States Magistrates* 75 to 80% of a district judge's salary.

Through the extraordinary effort of this Subcommittee and its staff, we raced the clock and calendar to pass H.R. 7375 during the closing days of the second session of the Ninety-second Congress. That amendment increased our salary to a maximum of 75% of that of a district judge, or $30,000.00.

Despite the clear legislative and Judicial Conference intent, and because of the most unusual circumstances created by our absence from inclusion in the Salary Commission enabling legislation, there is still a disparity between the salaries of magistrates and referees. Referees have received the benefit of a well deserved cost of living increase while we have not.

The Committee on the Judiciary of the House of Representatives has favorably reported H.R. 6184, which would now fix salaries of referees at $36,000.00. Its companion in the Senate is S. 582. When that bill was introduced on the floor of the Senate, the Chairman of this Subcommittee called his colleagues' attention to the effect of the six-year salary freeze on the quality and effectiveness of the bankruptcy court. We experience the same effect. Many of our members have been forced to resign for financial reasons, and not long ago I received a call from one of our most able and best qualified magistrates desperate because he is unable to borrow more money to pay college tuition for two children this coming fall.

Salaries of government attorneys who appear before us are substantially more than ours. Some metropolitan United States attorneys receive in excess of $36,000.00, and the rest make $36,000.00; their first assistants receive $35,000.00 or more. Heads of divisions and senior staff attorneys within that office receive more than $30,000.00, and federal public defenders are now authorized salaries equal to those of United States attorneys. Most administrative law judges begin at GS–16 ratings of $34,607.00, and while their expertise is limited like referees to a single specialty, ours must cover the entire spectrum of the law. One day we may try an environmental case; the next a maritime collision, a criminal case, or review an administrative agency record. We are the final judges in many instances, and hold in our hands broad and sweeping powers. Under existing statutes we can deprive a person of his liberty for as long as one year, or place him on probation for as long as five years. By our signature alone, we can authorize tearing down the door of any citizen's home, or determine who remains in jail or goes free on bond. Our work is almost totally decision making. We are judges of cases tried by government attorneys paid more than we are, and appellate courts to administrative law judges, who also receive more than we do. The equity or justice of this irony escapes us.

There can be no better justification or time for creating parity between magistrates and referees than now, as we consider legislation that will broaden our jurisdiction and confer additional responsibility. We do not ask that we be treated differently than others—only that we be treated the same.

Accordingly, we offer for your consideration the following amendment to § 634(a):

"Officers appointed under this chapter shall receive as full compensation for their services salaries [~~to be fixed by the conference pursuant to section 633 of this title.~~] at rates for full-time and part-time United States magistrates [~~not to exceed the rates~~] [as] now or hereafter provided for full-time and part-time referees in bankruptcy, respectively, referred to in section 40a of the Bankruptcy Act (11 U.S.C. 68(a)), as amended."

Parity would then exist as both this Subcommittee and the Judicial Conference have always intended.

We are grateful for the opportunity to appear this morning and welcome your questions.

EXHIBIT A

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
SUPREME COURT BUILDING,
Washington, D.C., March 14, 1975.

MEMORANDUM TO ALL FEDERAL JUDGES AND UNITED STATES MAGISTRATES

In order to encourage an expanded use of United States magistrates, the Judicial Conference at its meeting last week authorized me to distribute the attached memorandum and checklist to all federal judges and United States magistrates. Prepared by the Committee on the Administration of the Federal Magistrates System, the documents set forth those duties which are considered appropriate for delegation under the existing statute, 28 U.S.C. § 636.

BEST COPY AVAILABLE

The actual assignment of duties to magistrates is entrusted by the statute to the rule-making discretion of each district court. I urge you to review these documents and consider whether your court would benefit from an expanded use of magistrates in any of the areas suggested.

Sincerely yours,

ROWLAND F. KIRKS,
Director.

Enclsoures.

DUTIES WHICH MIGHT BE ASSIGNED TO UNITED STATES MAGISTRATES

During the first three full years of experience in the operation of the Federal Magistrates System, many district courts have benefited materially from the use of United States magistrates in the performance of important duties under 28 U.S.C. § 636(b). There follows a list of duties which can appropriately be assigned to magistrates.

The Judicial Conference urges the judges of each district court to review the list and consider whether their courts might benefit from a greater use of magistrates in any of the areas suggested.

1. General supervision of the district court's civil and criminal calendars, including handling calendar calls and ruling on motions to expedite or postpone the trial of cases. (28 U.S.C. § 636(b)(2))

2. Conduct of pretrial conferences and hearing procedural and discovery motions, subject to review by a district judge on exceptions filed by the parties. (28 U.S.C. § 636(b)(2))

3. Conduct of hearings and submission of a report and recommended disposition to a district judge in other pretrial motions, including dispositive motions, to the extent permitted by pertinent caselaw. See *Campbell* v. *United States District Court*, 501 F. 2d 196 (9th Cir. 1974), *cert. denied*, (419 U.S. 879); *Givens* v. *Grant*, 457 F. 2d 612 (2d Cir. 1972). But see *T.P.O., Inc.* v. *McMillen*, 460 F. 2d 348 (7th Cir. 1972).

4. Review of habeas corpus petitions filed by state prisoners under 28 U.S.C. § 2254 and by federal prisoners under 28 U.S.C. § 2255, and the preparation of a report and recommendation for the district judge as to (1) the need for an evidentiary hearing and (2) the disposition of the petition. (28 U.S.C. § 636(b)(3). A petition should not generally be referred to a magistrate, however, if resolution of the issues requires a personal knowledge of original trial proceedings by a district judge or might result in overruling a prior determination of a district judge.

5. Review of civil suits for the deprivation of rights under 42 U.S.C. § 1983, and the preparation of a report and recommendation to a district judge as to the defendant's eligibility to proceed *in forma pauperis*, the need for an evidentiary proceeding, and recommended disposition of the case. In appropriate cases, a magistrate might also be authorized to take on-site depositions, act as a mediator, or be appointed as a special master.

6. Conduct of trials in civil cases with the consent of the litigants.

7. Review of the record of administrative proceedings, in suits seeking judicial review of final decisions of administrative agencies, and submission of a report and recommendation to the district judge summarizing the administrative record and concluding (a) whether there are defects in the agency proceedings which rise to the level of a deprivation of due process; (b) whether there should be a remand to the agency for additional factual determinations to complete the record; and (c) whether there is substantial evidence in the record to support the ultimate determination of the agency. See *Weber* v. *Secretary of Health, Education, and Welfare*, 503 F. 2d 1049 (9th Cir. 1974)). But see *Ingram* v. *Richardson*, 471 F. 2d 1268 (6th Cir. 1972).

A more comprehensive list of duties is attached as an appendix.

GENERAL PROCEDURAL GUIDELINES FOR THE ASSIGNMENT OF "ADDITIONAL DUTIES" TO MAGISTRATES

A magistrate must be authorized by local rule of court to perform "additional duties," 28 U.S.C. § 636(b). Such authorization may be phrased in general terms or it may set forth in detail the types of duties authorized to be performed by each magistrate.

The reference of a case to a magistrate, in whole or in part, should be made openly and on the record. In general, the parties should be apprised of such delegation. A general, consistent practice of the court, embodied in a local rule, may be sufficient notice to the parties.

GENERAL GUIDELINES FOR REVIEW BY A DISTRICT JUDGE

Where a magistrate submits a report or recommendation to a judge, the parties should receive copies of the report and recommendation.

The parties should be allowed a reasonable time within which to raise specific objections to the report and recommendation.

Where a magistrate makes a finding or ruling on a motion or an issue, his determination should become that of the district court, unless specific objection is filed within a reasonable time.

In any case where a party files objections in timely fashion, the appropriate district judge should consider the specific issues objected to as if they were raised before him initially. In no case, should the discretion of the district judge be limited so as to require that he grant any party a fuller hearing than would be required if he heard the matter initially.

APPENDIX

Jurisdictional Checklist

Duties which may be delegated to magistrates

A. "ADDITIONAL DUTIES" UNDER 28 U.S.C. § 636(b)

Criminal proceedings

1. General supervision of the criminal calendar, including calendar calls and motions to expedite or postpone the trial of cases. 28 U.S.C. § 636(b)(2).

2. Conduct of pretrial conferences, omnibus hearings, and related proceedings. Id. Any party should have a right to appeal an adverse determination by a magistrate to a district judge.

3. Hearing of procedural and discovery motions, including motions for the suppression of evidence, and the conduct of necessary hearings thereon. See *Campbell* v. *U.S. District Court*, 501 F. 2d 196 (9th Cir. 1974), *cert. denied* October 15, 1974 (No. 73-6941). Any party aggrieved by a magistrate's determination should be entitled to a hearing before a district judge to the same extent as if the district judge were hearing the matter initially.

4. Conduct of post-indictment arraignments, acceptance of not guilty pleas, and the ordering of a pre-sentence report on a defendant who signifies the desire to plead guilty. A magistrate should not be empowered to accept pleas of guilty or nolo contendere in cases outside the jurisdiction specified in 18 U.S.C. § 3401. Rules 10 and 11, Fed.R.Crim.P. See the Report of the Judicial Conference for 1971, p. 54.

5. Conduct of preliminary hearings leading to the revocation of probation. See *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

6. Conduct of final probation revocation hearings and submission of a report and recommendations to the judge. Any party aggrieved by a magistrate's determination should be entitled to a hearing before a district judge to the same extent as if the district judge were hearing the matter initially.

Prisoner petitions

7. Review of habeas corpus petitions filed by state prisoners under 28 U.S.C. § 2254, the issuance of orders to show cause and other necessary orders to obtain a complete record, and the preparation of a report and recommendation as to (1) the need for an evidentiary hearing and (2) the disposition of the petition. 28 U.S.C. § 636(b)(3). But see *Ellis* v. *Buckhoe*, 491 F. 2d 716 (6th Cir. 1974).

8. Review of habeas corpus petitions filed by federal prisoners for the correction or reduction of sentences under 28 U.S.C. § 2255, and the preparation of a report and recommendation to the district judge as to the disposition of the case. Id. A petition of a federal prisoner should not be referred to a magistrate if resolution of the issues requires a knowledge of the original trial proceedings or might result in overruling a prior determination of a district judge.

9. Review of civil suits for the deprivation of rights under 42 U.S.C. § 1983 and the preparation of a report and recommendation to a district judge as to the defendant's eligibility to proceed *in forma pauperis* and the need for evidentiary proceedings; and submission of a report recommending a disposition of the case.

10. Taking on-site depositions, gathering evidence, and serving as a mediator at the holding facility in connection with civil rights suits filed by prisoners contesting conditions of confinement under 42 U.S.C. § 1983.

11. Review of prisoner correspondence.

Civil proceedings

12. General supervision of the civil calendar, including the handling of calendar calls and motions to expedite or postpone the trial of cases. 28 U.S.C. § 636(b)(2).

13. Conduct of preliminary and final pretrial conferences, status calls and settlement conferences, and the preparation of a pretrial order following the conclusion of the final pretrial conference. Id. Any party should have a right to appeal an adverse determination by a magistrate to a district judge.

14. Hearing and determining procedural and discovery motions, and the conduct of necessary hearings thereon. Id. Any party aggrieved by a magistrate's determination should be entitled to a hearing before a district judge to the same extent as if the district judge were hearing the matter initially.

15. Consideration of motions for summary judgment and dismissal. See *Givens* v. *Grant*, 457 F. 2d 612 (2nd Cir. 1972), and *Remington Arms Co., Inc.* v. *United States*, 461 F. 2d 1268 (2nd Cir. 1972). But see *TPO, Inc.* v. *McMillen*, 460 F. 2d 348 (7th Cir. 1972). Any party aggrieved by a magistrate's determination should be entitled to a hearing before a district judge to the same extent as if the district judge were hearing the matter initially.

16. Acceptance of jury returns in the absence or disability of the trial judge.

17. Conduct of trials in civil cases by consent of all the parties. The stipulation of the parties in such cases should provide for entry of judgment.

18. Entry of default judgments in appropriate cases and the review of motions to set aside default judgments. Rule 55, Fed.R.Civ.P.

Special Master References

19. Hearing testimony and submitting a report and findings on complicated issues in jury cases or in matters of account, difficult computations of damages and exceptional conditions in non-jury cases. Rule 53(b), Fed.R.Civ.P.

20. Supervising discovery in connection with special aspects of patent antitrust cases, especially where there are a great many issues, claims and documents, or in multiple disaster and class action cases where there are numerous claimants and diverse claims.

21. Serving as a commissioner to determine compensation and assess damages in land condemnation cases under Rule 71A(h), Fed.R.Civ.P.

22. Serving as a master for the assessment of damages in admiralty cases.

23. Conducting evidentiary hearings and preparing findings in employment discrimination cases under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e—5(f).

Judicial Review of Administrative Proceedings

24. In suits for judicial review of final decisions of administrative agencies, reviewing the record of administrative proceedings. This function is usually delegated to magistrates in the following types of cases:

a. Decisions regarding the granting of benefits to claimants under the Social Security Act, the "Black Lung" benefits laws, and related statutes;

b. The administrative award of licenses and similar privileges; and

c. The adjudication by the Civil Service Commission of adverse employee actions, retirement eligibility and benefits questions, and the rights of employees in such situations as reductions in force.

In such cases, a magistrate may be authorized to submit a report to the district judge summarizing the administrative record and concluding (1) whether there are defects in the agency proceedings which rise to the level of a deprivation of due process, (2) whether there should be a remand to the agency for additional factual determinations to complete the record, and (3) whether there is substantial evidence in the record to support the ultimate decision of the agency. See *Weber* v. *Secretary of Health, Education, and Welfare*, 503 F. 2d 1049 (9th Cir. 1974), *Yascavage* v. *Weinberger*, 379 F. Supp. 1297 (M.D. Pa., 1974), *Arnold* v. *Weinberger*, Civil No. B-369 (D. Conn., decided June 24, 1974), and *Murphy* v. *Weinberger*, Civil No. B-613 (D. Conn., decided March 25, 1974). But see *Ingram* v. *Richardson*, 471 F. 2d 1268 (6th Cir. 1972). Any party aggrieved by a magistrate's determination should be entitled to a hearing before a district judge to the same extent as if the district judge were hearing the matter initially.

Miscellaneous Duties

25. The review of petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act and the submission of recommendations to the court.

26. Issuance of subpoenas and writs of habeas corpus ad testificandum and habeas corpus and prosequendum.
27. Examining judgment debtors. Rule 69, Fed. R. Civ. P.
28. Coordination of the court's efforts in such fields as the promulgation of local rules and procedures and the administration of the forfeiture of collateral system.
29. Imposition of civil fines and penalties under the Federal Boat Safety Act. 46 U.S.C. §§ 1451-1489.
30. Issuance of orders prior to ratification of sale in mortgage foreclosure proceedings on properties financed through Government loans (Veterans Administration and Federal Housing Administration).
31. Supervision of proceedings on requests for letters rogatory in civil and criminal cases, upon special designation by the district court.
32. Conduct of inquests on damages in cases involving default judgments.

B. COMMISSIONER-TYPE DUTIES

1. Processing of complaints and issuing appropriate summonses or arrest warrants for the name defendants. Rule 4, Fed.R.Crim.P.
2. Issuance of search warrants upon a determination that probable cause for the warrant exists. Rule 41, Fed.R.Crim.P.
3. Conduct of initial appearance proceedings for defendants, informing them of their rights, admitting them to bail and imposing conditions of release. Rule 5, Fed.R.Crim.P. and 18 U.S.C. §3146.
4. Appointment of attorneys for indigent defendants, together with the administration of the court's Criminal Justice Act plan, the maintenance of a register of eligible attorneys, and the approval of attorneys' expense vouchers. 18 U.S.C. § 3006A.
5. Conduct of full preliminary examinations. Rule 5.1, Fed. R. Crim. P. and 18 U.S.C. § 3060.
6. Conduct of removal hearings for defendants charged in other districts: and, upon special designation by rule of court, the issuance of warrants of removal. Rule 40, Fed. R. Crim. P.
7. Administering oaths and taking bail, acknowledgements, affidavits and depositions. 28 U.S.C. § 636(a)(2).
8. The setting of bail for material witnesses. 18 U.S.C. § 3149.
9. Upon special designation by the district court, the conduct of extradition proceedings. 18 U.S.C. § 3184.
10. Holding to security of the peace and for good behavior. 18 U.S.C. § 3043.
11. The discharge of indigent prisoners or persons imprisoned for debt under process or execution issued by a federal court. 18 U.S.C. § 3569 and 28 U.S.C. § 2007.
12. Issuance of an attachment or order to enforce obedience to an Internal Revenue Service summons to produce records or give testimony. 26 U.S.C. § 7604(b).
13. Instituting proceedings against persons violating certain civil rights statutes. 42 U.S.C. § 1987.
14. Settling or certifying the nonpayment of seamen's wages. 46 U.S.C. § 603.
15. Enforcing awards of foreign consuls in differences between captains and crews of vessels of the consul's nation. 22 U.S.C. § 258(a).
16. The trial and sentencing of defendants in minor offense cases by consent of the defendants. 18 U.S.C. § 3401.

STATEMENT OF MOREY L. SEAR, CHAIRMAN, LEGISLATIVE COMMITTEE, NATIONAL COUNCIL OF U.S. MAGISTRATES AND MAGISTRATE, U.S. DISTRICT COURT, NEW ORLEANS

Mr. SEAR. Thank you, Mr. Chairman.

Mr. Chairman, may I first introduce to you the President of the National Council of United States Magistrates, Magistrate Geffen, from California, and three magistrates from the District of Columbia, Magistrates Burnett, Margolis, and Dwyer, who are here with us today.

Senator BURDICK. We are pleased to have you here.

Mr. SEAR. I note that the Senate has before it here today very pressing business, and I wondered how we are with time?

Senator BURDICK. It is so pressing that legally, we have to stop all operations at 10 o'clock sharp. So, be guided accordingly.

Mr. SEAR. Well, then, if I may depart from our statement, and go, if you will, to those things, that we consider most important and pressing.

We have found, over the past 4 years of operating under what has become known as the Federal Magistrates Act, that the legislative history that was established prior to the passage of that act has formed the very basis and foundation of the legal decisions that bring us here today. And it is because of that legislative history many of the restrictions that we now face have been placed upon us.

I do not believe that one has to have a copy of the hearings before Senator Tydings' committee to know that legislative history in full. One can start with decisions after magistrates began operation and from *T.P.O.* v. *McMillan* down as recently as last month in *DeCosta* v. *CBS*. The courts have repeatedly quoted from the legislative hearings in determining whether magistrates could perform certain functions under the existing law. And I believe that many courts have been reluctant to approve references to magistrates because of the absence of some legislative direction and some uniformity, which Mr. Westphal has already touched on today.

I believe that we are now developing, by this amendment, some feeling for what the Congress really intends, in view of the experience we have had, what judicial decision we choose to write out, and substitute new words in statute form. I think that at the outset, we ought to understand—and those who read behind us, Mr. Chairman, must understand—that this piece of legislation, 1283, is intended specifically to remove the impediments of *Wedding*, of *T.P.O.* v. *McMillan*, of *Ingram* v. *Richardson*, and those other restrictive cases.

I think that, those new areas of jurisdiction that we include must be clarified by this.

You discussed with Judge Metzner, motions that would fall understandably under rule 12(b) of the Federal Rules of Civil Procedure, and I would agree that those motions that address themselves to failure to state a claim should be motions that would be considered dispositive, and would be subject to review on a different basis than the clearly erroneous basis of the so-called nondispositive motions.

But I think that this record ought to indicate clearly that the other motions, such as provided in rule 12(b), including ones that address themselves to jurisdiction over the subject matter, jurisdiction over the person, lack of service, and sufficiency of manner of service, improper venue, and failure to join a necessary party, are the types of motions that Mr. Westphal referred to that are virtually ministerial, that the magistrate can review the record and determine simply without placing the court in a situation of having to almost review de novo.

In addition to that, Mr. Chairman, we have discussed at length—Mr. Westphal and Judge Metzner have—the time limitations that section C of the act imposes upon the filing of objections to findings of the magistrate. That stated period is 20 days, and I have some very strong feelings about that 20-day pericd.

My feelings stem from the delay that results and the uncertainty that exists, and I suggest to you that a case that is fixed for trial, that has a trial date, might be 30 or 45 days down the road. The motion is filed, argued, heard, findings are submitted. Twenty days must pass. During that 20-day period, an objection is filed. It must be set on the calendar for hearing, and we may be talking about an overall delay of anywhere from 30 to 45 days, before final determination of a motion that was heard 45 days to 2 months before.

I see no reason that that delay should be any different than a delay that is set by law, has worked quite well for a number of years, in the case of special masters. Rule 53(b) provides a 10-day period in order to file objections. If it has worked for representatives outside the court system, it seems to us it should work for us.

I think that the legislative history of this committee should also include some reference to what this Congress intends, insofar as consensual references are concerned. I believe that the constitutionality of that provision of this statute has, long ago, been clearly established.

I have appended to our statement, Mr. Chairman, the duties or the checklist that Judge Metzner referred to, prepared by the Judicial Conference of the United States, and I would refer, if I may, to page 3 of that checklist and paragraph 17, that makes reference to the stipulation of the parties in a consensual reference. And I would like to read that provision. It refers to the conduct of trials in civil cases by consent of all of the parties, and suggests, Mr. Chairman, that "the stipulation of the parties in such cases should provide for entry of judgment." We share that view expressed in that paragraph of the Judicial Conference checklist, and since the essence of consensual reference is an agreement of the parties, it seems appropriate to us that the parties themselves determine the type and scope of review that they desire themselves in such cases, and that they ought to be free to consent to review by the district judge, of both fact and law, or law only, as they now do under rule 53(e)(4).

Mr. WESTPHAL. Mr. Chairman, I wonder if Mr. Sear might yield for questions.

Mr. SEAR. Certainly, Mr. Westphal.

Mr. WESTPHAL. Under the language which is recommended by the Judicial Conference, and which is carried through in the printed amendment in subsection 2 on page 3, it says a judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to provisions of rule 53(b). Now, my question to you is, is it not implied in that language that the provision of rule 53(e)(4) that you referred to is incorporated into any proceeding where the case is being tried by the master, by consent of the parties? In other words, 53(e)(4) requires that parties, when they consent to the trial, before the master, also agree as to the type of review, whether it will be all on fact, or on law only. So is that not implied by the language that we now have?

Mr. SEAR. I hope it is, Mr. Westphal. I believe the language was put in there principally to remove the impediment that was created by *LaBuy* v. *Howes Leather*. I would hope that in the future, we would read the legislative history, as you have just described it, because that would be, in my judgment, a better view to take of what was intended.

It was certainly intended that the magistrate, when he conducts a trial by consent, is trying it just as the district judge would try the case.

Mr. WESTPHAL. I think two things are intended: No. 1, to get rid of LaBuy and No. 2, you carry with it the idea that if the parties do consent to the trial by a magistrate, that their consent should include that which is required under 53(e)(4), and that is some agreement as to whether the judge of the court will review only as to legal questions or review both law and the facts.

Mr. SEAR. Or neither, and that the magistrate himself could enter the judgment.

Mr. WESTPHAL. That is my understanding of what is intended. And I take it, Judge Metzner, that you would agree with that?

Judge METZNER. I do.

Mr. WESTPHAL. Thank you. You may proceed.

Mr. SEAR. Mr. Chairman, I would like to mention three other things, if I may. We believe that ancillary to the authority that is given us by the Congress to conduct these various proceedings and perform these duties, it is necessary to have some limited contempt power, the same power, if you will, that the referee now has conferred upon him as recently as 1973, and identical to that which is provided in their rule 920.

I would also suggest that there be some general statement in this particular piece of legislation that makes clear the role of a magistrate in a proceeding before him, a similar provision to that which is found in rule 52(a) of the Court of Claims, which provides:

> The commissioners shall serve as the trial judges to the extent of the authority therefor prescribed by statute in these rules. As such, they shall have the power to do and perform any acts which may be necessary or proper under the court's orders of reference and these rules for the efficient performance of their duties and the regulations of proceedings before them.

I believe that that provision is precisely what Mr. Westphal was just referring to. If that be clearly understood, Mr. Westphal, whether it be in the legislative history of the act, or whether it be included in the words of the act, I believe that in order for those who must interpret the statute to know what is intended, some provisions of that nature or some history to that effect should be included.

We also find ourselves badly in need of a provision that would provide that reference to court and judge in certain categories of statutes and rules shall be deemed to include magistrate. We find ourselves faced with problems involving the use of those words all of the time. As a matter of fact, that is primarily the reason we are here today. The statute, in *Wedding* v. *Wingo*, made reference to the judge, and because it made specific reference to the word the judge, the Supreme Court found that those duties cannot be conferred upon a magistrate.

So I assume, Mr. Chairman, that the opening clause of this proposed amendment, "notwithstanding any provision of the law to the contrary" was intended by the drafters to be broad enough to include a magistrate where court and judge are used in statutes and rules, so as to avoid the necessity of going back to amend individual statutes.

Mr. WESTPHAL. May I interject?

Senator BURDICK. Yes.

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Mr. WESTPHAL. I think that, Mr. Sear, you have covered what I always understood was the intent of the Judicial Conference when they recommend to Congress that we enact the statute starting out by saying "notwithstanding any provision of the law to the contrary," because that language as I understand it, was intended to overcome this debate they had in the decision in *Wingo* v. *Wedding*, as to just what was meant when the statute on habeas corpus uses the word, judge. And of course, it would be virtually impossible for Congress to go through and amend every appropriate statute, to say judge and/or magistrate. And it would be impossible for Congress to pass a general statute which would say the word judge shall also be deemed to mean magistrate in every instance. It just cannot be done. So it is the in ent of the drafters of both the Judicial Conference and the legislative staff that that language "notwithstanding any provision of law to the contrary" is intended to cover just that situation.

Mr. SEAR. Thank you very much.

Mr. WESTPHAL. Judge Metzner, do you agree to that?

Judge METZNER. Yes, that is so.

Mr. SEAR. Now, Mr. Chairman, if I may turn to my favorite subject. I would like to address myself to the question of salaries that U.S. magistrates receive. I believe that no group of public servants have suffered more financial hardship than have the U.S. magistrates. We are mindful that all Federal employees, including Members of Congress, Mr. Chairman have had to wait far too long for any salary relief, but the legislative history of the Federal Magistrates Act and the history of meetings of the Judicial Conference of the United States have indicated a very clear and very frank, forthright intent to place magistrates and bankruptcy judges on parity, salarywise.

By a strange quirk of fate, Mr. Chairman, U.S. magistrates are not included in that legislation that enables or which establishes salaries for all other judicial officers, the present Salary Commission. It is not included, if you will remember, Mr. Chairman, because we did not exist at the time that that legislation was created. And we have, as a consequence, trailed behind our brothers, the referees and others in judicial service.

I might point out to you, Mr. Chairman, the inequities that presently exist, when I suggest to you that U.S. attorneys who practice before us are paid $36,000 a year. In some metropolitan areas, they receive as much as $40,000 a year, their first assistants, $35,000 or more; chiefs of divisions and senior staff attorneys within their offices receive in excess of that which we receive; Federal public defenders who practice before us receive as much as U.S. attorneys. We try their cases, and we act as the trial judges to them. Social security hearing examiners, receive substantially more than we do, and we act as their appellate judges, and today we are here before this subcommittee testifying on a bill that will broaden and increase our jurisdiction.

Our job is essentially one of decisionmaking. We are the triers, the sole triers, of persons charged with crimes, and we have the power to sentence people to jail for as long as 1 year, to place them on probation for as long as 5 years, to fine them substantial sums of money, to issue search warrants to beat down their doors of their homes, and

authorize agents to search them, and here we are, lagngg substantially behind our brothers who perform similar duties.

We do not ask, Mr. Chairman, to be treated any differently than anyone else. We only ask that we be treated the same. The Senate has already considered, or this subcommittee has already considered, a bill that would make mandatory the payment to referees the heretofore fixed maximum of $36,000. And the House of Representatives, in its subcommittee and Committee on the Judiciary, has already approved such legislation.

We would ask only, Mr. Chairman, that our act be amended to include, in 636(a), the following provision, "that officers accorded under this chapter shall receive, as full compensation for their services, salaries at rates for fulltime and parttime United States Magistrates, as now or hereafter are provided for fulltime and parttime referees in bankruptcy, respectively, referred to in Section 40(a) of the Bankruptcy Act, 11 USC 68(a) as amended." That, Mr. Chairman, would, for the first time, place us on parity as this committee intended that we be, and as the Judicial Conference has intended that we be.

Now, sir, we would be happy to answer whatever questions you or Mr. Westphal may have for us.

Senator BURDICK. I appreciate your concern about the salary situation, and we will probably go into that more fully, of course, but this is primarily to hear this present bill. But we appreciate your concern.

Mr. SEAR. We thought no greater time could exist, and no more pressing need could be, Mr. Chairman, than to offer it at a time when jurisdiction was being increased.

Senator BURDICK. Well you seized time by the forelock?

Mr. SEAR. Yes, sir. As you recall, a few years ago, I told the Senator that, as we raced the clock before, that I would be back.

Senator BURDICK. I want to thank you for your contribution this morning, and your views, but I have no further questions.

Mr. WESTPHAL. I have one question, Mr. Chairman, if I could ask it. On this matter of whether subsection (C) should specify a procedure by which an aggrieved party can obtain a review of proposed findings or order on dispositive type motions, I take it, number one, that you are in agreement that, if a time is to be specified, it should be 10 days, rather than 20 days?

Mr. SEAR. Yes, sir.

Mr. WESTPHAL. Now, we have the question which is, whether we should have a procedure specified or whether we should leave it to local rule. Let me ask you this. If it were left to local rule can you conceive of any of the 94 judicial districts having a rule which would specify less time than 10 days within which the parties should take objection to the report?

Mr. SEAR. I really cannot conceive of one that would have less than 10 days. I can conceive of those that, if left to local rule, would have more than 10 days, but I think that the lack of uniformity is one of things that has had the chilling effect upon the use of magistrates and the understanding of procedures that should be followed in their use.

Mr. WESTPHAL. What is your feeling about the reasons I have stated for these two types of discretionary power; that is, any pretrial matter wherein the magistrate has the power to hear and determine, and the dispositive motions where he has the power to hear and then

recommend? The reason we have a procedure for the one specified but not specified for the other is to demonstrate a clear intent that we regard the one as being more serious, and that, at this particular time time when we are trying to overcome *Wingo* v. *Wedding* and *T.P.O.* v. *McMillan*, and these others which have indicated, on the part of district and appellate judges alike some reluctance to vest in magistrates as much authority as perhaps we might eventually want to, but in any event, to treat the two of them differently, do you agree that that is consistent with the theory of this bill?

Mr. SEAR. Yes; I do.

Mr. WESTPHAL. The other thing is this, that on a pretrial matter which can be heard and determined by the magistrate where, under subparagraph (A), we do not specify the procedure, that could be left to local rule, it seems to me there is a reason for it, and that is that those pretrial matters cover a whole variety of motions and orders that the magistrate might issue in response to a motion, and they can occur at varying times in the litigation. You could hold a pretrial conference and issue a pretrial order restricting a number of expert witnesses, excluding certain photographs because they are too grisly, or doing a number of things, and you might hold that pretrial conference a week before the case is set for trial, or 3 days before the case is set for trial. How could he possibly specify a time limit for that? It has to be handled sort of ad hoc, as may be guided by local rule.

But in the other area. where you have these important dispositive motions which will terminate the litigation, it seems to me that there is an advantage in specifying an exact procedure which the lawyers of this country will know that this is the procedure for them to follow, if they feel aggrieved by any of these motions. Do you agree with that philosophy?

Mr. SEAR. I would agree with that; yes, Mr. Westphal. I agree with it for another reason; it is a more practical reason. With the exception of the 20-day period, the language of the proposed statute, I think, can be reduced in content and number of words, perhaps. The procedure is one that places the responsibility for doing this on the clerk of court, which is a place where I believe it belongs. We are limited in the people that we have, the staff that we have. I think it places the responsibility, and it lets everybody know where you get it, and when you should receive it, and so forth.

My only objection, really, is to the length of time. I think it is twice what it need be.

Mr. WESTPHAL. But you would be satisfied with 10 days?

Mr. SEAR. Yes.

Mr. WESTPHAL. As a matter of fact, it would be very unusual for anybody, by local rule or under specific order, to specify less than 10 days, expecially if you are going to serve parties with a copy by mail.

Mr. SEAR. I would be satisfied with that.

Mr. WESTPHAL. I have no further questions.

Senator BURDICK. Thank you very much.

Judge METZNER. I have the report of the Judicial Conference I would like to be put in the record.

Senator BURDICK. It will be received, without objection.

[The material referred to follows:]

JUDICIAL CONFERENCE OF THE UNITED STATES

PROPOSED AMENDMENT TO THE FEDERAL MAGISTRATES ACT

(Pub. L. No. 90-578; 28 U.S.C. §§ 631ff)

Adopted on March 7, 1975, upon the recommendation of the Committee on the Administration of the Federal Magistrates System.

It is recommended that existing section 636(b) be repealed and that a new section 636(b) be adopted to read as follows:

"(b)(1) Notwithstanding any provision of law to the contrary, a judge may designate a magistrate to hear and determine, subject to review as hereinafter provided, any pretrial matter pending before the court except motions which are dispositive of the litigation, the disposition of which the magistrate may recommend, but not order. A judge may also designate a magistrate to conduct evidentiary hearings and make recommendations for the disposition of applications for post-trial relief made by individuals convicted of criminal offenses and prisoner petitions challenging conditions of confinement. Upon timely request, as fixed by local rule of court, by any party who has appeared before the magistrate, either personally or by submission of affidavits or brief, the court shall hear *de novo* those portions of the report or specific proposed findings of fact or conclusions of law to which objection is made.

"(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of Rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

"(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

"(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties."

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The growth in the size of the federal judiciary over the last ten years has been proceeding at a phenomenal rate. On June 30, 1965 there were 288 district judges, with annual combined civil and criminal filings of 101,000 cases. On June 30, 1974 there were 400 district judges, with combined annual civil and criminal filings of 143,000 cases. This represents a 40 percent increase in the number of judgeships, with a 43 percent increase in filings.

With this rate of growth we can expect to require a trial bench of 560 judges ten years from now with annual combined civil and criminal filings of about 200,000 cases. The Congress has added a number of new fields of litigation creating responsibilities and duties which never existed before. (Appendix A) The full impact of this legislation has not as yet been felt by the courts. The pressure has been compounded with the recent enactment of the Speedy Trial Bill.[1] It is mandatory that the district courts make greater use of their magistrates if the guidelines of that bill are to be achieved without further drastically increasing the size of the judiciary.

It is our considered judgment that we cannot continue to cope with this problem by increasing the number of district judges and the supporting staffs of law clerks, secretaries, court clerks, and court reporters, etc., with the concomitant need for huge additional physical space.

The Congress itself has asked about the utilization of magistrates in weighing the request for additional judges. During the recent hearings on the Omnibus Judgeship Bill, for example, the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, strongly criticized the chief judges of several district courts who had been invited to testify as to their needs for additional judges because their courts had allegedly failed to take full advantage of the provisions of the Magistrates Act before seeking additional judge-power. Congress has not as yet, except in a few instances, really evaluated the huge expenditures for new buildings necessary to contain the burgeoning judiciary.

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[1] Public Law No. 93-619, January 3, 1975.

The Comptroller General submitted a report on the magistrates system to the Congress on September 19th which recommended in part that: (1) The Judicial Conference take the lead in encouraging district judges to make greater use of magistrates under the existing law; (2) the Congress further define the authority of magistrates; and (3) the Congress consider amending the Act to expand the trial jurisdiction of magistrates to include most misdemeanors.

Our proposal is simply that the first call on judges' time should be to try cases and to hear important matters such as preliminary injunctions. Full-time magistrates need not be appointed if the judge has sufficient time to handle his docket without help. Our traditional procedures have made the judge available for practically every possible application for relief except in minor circumstances. The suggested change is not as unusual as it sounds because it has been used for years in England through the system of masters.

The Report of the Committee to Study the Operation of the Masters in the English Judicial System (Appendix B) effectively demonstrates the ability of masters to handle virtually all civil pretrial matters in England. We are confident that we can successfully duplicate the English experience through the use of magistrates.

Essentially the magistrate is a judicial officer. He discharges his responsibilities *qua* magistrate in the pretrial area, and this is made clear in proposed section 636(b)(1). Any other responsibilities, such as a special master assignment, are set forth in a separate subdivision of section 636.

It was the lack of clarity in expressing this concept which led to many of the judicial decisions limiting the use of magistrates contrary to what appeared to have been the intent of Congress.[3] In any event, the proposed language clarifies what we think was the original intent in creating the office of magistrate and expands his duties.

Under the proposal the magistrates will play a major role in expediting civil and criminal litigation in the district courts. They will be empowered to conduct all pretrial conferences and hear any pretrial matter in the district court. Magistrates may determine, subject to review on application of a party, any motion which is not dispositive of the litigation. If the ruling of the magistrate will be dispositive of the litigation, he may only report his recommendation for disposition to the court. This limitation would apply to motions to dismiss and motions for summary judgment. It should also apply to motions to suppress evidence in criminal proceedings. Although not technically dispositive of the litigation, the ruling usually leads to disposition by a plea of guilty by the defendant or a dismissal or *nolle prosequi* by the prosecution.

The inherent justification of this proposal is evident when we consider the huge proportion of civil cases which are disposed of without meaningful intervention by judges. The figures for the fiscal year 1974 show that only 8,382 cases were disposed of by court or jury trial out of a total of 96,701 civil cases. This amounts to 8.7 percent. There is no doubt that many more cases are disposed of without trial because of the active intervention by the court. However, even the most liberal experience would show that these would not rise to 25 percent of the total. These 25 percent would continue to require meaningful judge intervention, but the remaining 75 percent would not be there for his attention under any circumstances. Finally, we see in this proposal a start in reducing the enormous amount of paper work now required by our procedures. There is no reason why a pretrial conference may not eventually be heard by a magistrate and counsel with the only piece of paper being the resulting order entered to guide counsel toward the ultimate trial, if one is necessary.

Magistrates will also be empowered to conduct evidentiary hearings on applications for post-trial relief and on prisoner petitions challenging conditions of confinement. This is an extension of the power presently existing in § 636(b)(3), whereby a magistrate may only recommend to the district judge whether or not an evidentiary hearing should be held. This provision is intended to apply to both federal and state prisoner petitions for post-trial relief and challenging conditions of confinement. The proposal conforms to any restrictions in *Wingo* v. *Wedding* (418 U.S. 461 (1974)) by explicitly granting the power "notwithstanding" any provision of the law to the contrary.

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[3] *Wingo* v. *Wedding*, 418 U.S. 461 (1974), *affirming* 483 F. 2d 1131 (6th Cir. 1973); *Flowers* v. *Crouch-Walker Corp.*, No. 72 C 2304 (7th Cir. December 18, 1974); *Ellis* v. *Buckhoe*, 491 F. 2d 716 (6th Cir. 1974); *Ingram* v. *Richardson*, 471 F. 2d 1268 (6th Cir. 1972); *TPO, Inc.* v. *McMillen*, 460 F. 2d 348 (7th Cir. 1972); *United States* v. *Eastmount Shipping Corp.*, 62 F. R. D. 437 (S.D.N.Y. 1974).

The argument may be made that the *de novo* review provisions will only create another layer in the judicial process. Experience to date in the nondispositive civil pretrial area of rulings by magistrates clearly shows that appeals are seldom taken by losing litigants. However, the right to review of nondispositive rulings will be available to the parties if they desire to take an appeal within the time provided by local rule, by filing objections with the district judge.

In the dispositive area of civil pretrial proceedings, habeas corpus and prisoner petitions, the magistrate may only recommend a disposition. This has been provided to avoid the possible constitutional objection that only an article III judge may ultimately determine the litigation. We are not prepared at this time to thrash out the issue, although there is respectable authority that finds Congressional power sufficient to avoid any constitutional objection. (Appendix C). The need for this proposal is such that we should proceed as suggested. We are confident that, with the continued appointment of competent lawyers as magistrates, their high level of performance will greatly diminish the requests for review. The English experience in the dispositive area of civil litigation, even with the unfettered right to appeal masters' rulings, shows that the number of appeals is minuscule.

It will be time enough after several years' experience with the proposed procedures to face the constitutional issues if it is suggested that the scope of review should be limited.

Finally, the magistrate should be permitted to be designated as a special master to try the issues in any civil case, subject to the procedures and limitations presently found in Fed. R. Civ. P. 53. However, if the parties consent, the court may designate a magistrate to act as a special master in the trial of the issues, without the limitations of Rule 53(b).

The proposed section provides that each district court shall establish rules for the discharge of a magistrate's duties. This requirement is found in the existing section. Experience has shown that districts have different local procedures and needs. Further, all districts do not use magistrates in the same fashion. They attempt to adapt the system to best serve their own local needs. The statute will give the power to act, and the districts can best determine how to use it. If the proposal is adopted, it is intended to issue a checklist of duties permissible under the statute for the guidance of local districts in drawing their rules.

• • • • • • •

Section 1 of the bill amends subsection 636(b) of title 28 to broaden and clarify the jurisdiction of United States magistrates. It sets forth the general authority for the assignment of certain duties to magistrates by district judges and provides basic procedures governing the method for making such assignments and the scope of review afforded the parties.

Subsection (b)(1)—first sentence—Pretrial

Proposed subsection (b)(1) authorizes a district judge to designate a magistrate to hear any pretrial matter pending before the court. The power is clear and explicit and contemplates that the reference is to a magistrate as a judicial officer and that he exercises his functions *qua* magistrate. He is not another legal aide to the court, nor a special master, nor a para-judicial employee of the court.

Proposed subsection (b)(1) authorizes the designation of a magistrate to perform these duties, notwithstanding any provision of law to the contrary. Throughout the United States Code there are statutes which provide for the conduct of certain proceedings by the district courts and by the district judges. Many of these laws were enacted long before the concept of United States magistrates began to emerge. Such a statute was a primary basis for the Supreme Court's ruling in the *Wedding* case. Proposed subsection (b)(1) eliminates restrictions which such statutes might place on the use of magistrates in the only feasible manner. It would be far too cumbersome to search every federal statute and insert the words "or magistrate" in each appropriate situation. Proposed subsection (b)(1), however, does not remove possible constitutional restrictions on the use of magistrates (such as the provisions of article III) nor statutory restrictions which are not jurisdictional in nature (such as the basis for judicial disqualification of section 455 of title 28).

Proposed subsection (b)(1) is broadly worded to authorize the maximum use of magistrates prior to trial. It is not intended to interfere with the discreton of the district court as to the mode of pretrial or discovery proceedings. It is, however, intended to allow those district courts which choose to do so to fully utilize the services of United States magistrates.

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The designation may be made in a variety of ways suited to the needs of the particular district court. On the one hand, it could be made by the individual judge in a particular instance on a case by case basis. On the other extreme, a local rule of court could authorize the general assignment of all cases to a magistrate for the conduct of all pretrial proceedings. Under such a rule, the clerk would routinely send each case to a magistrate upon filing. The power to adopt such rules is contained in subsection (b)(4) and allows for full flexibility in procedures.

This subsection authorizes a magistrate to hear any matter that arises prior to trial in any civil or criminal case—including pretrial conferences, discovery questions, motions for continuance, motions for summary judgment, motions to dismiss, and motions for suppression of evidence.

As a necessary adjunct to this authority, a magistrate would be empowered to hear oral argument and to receive evidence and hear witnesses as he deems necessary. Proposed subsection (b)(1) does not include specific language on this point because the diversity of the issues and motions which might arise before a magistrate precludes a simple statement of such powers. It is felt that any attempt to define these powers by statute might result in the same type of limiting court interpretations which evolved under the existing statute. It would restrict the discretion of the magistrate to determine the nature of the hearing required or the authority of a district judge to order that a particular proceeding be conducted.

In those instances where the matter is not dispositive of the litigation, such as motions for continuances, questions on discovery, or matters of procedure, the magistrate is authorized to rule on the issues raised. The parties are provided an opportunity to appeal, of right, to the district judge. Where no party takes a timely appeal, the determination of the magistrate will become the ruling of the district co rt automatically.

Where the matter is dispositive of the litigation, the magistrate is empowered to conduct all proceedings necessary to reach a recommended determination of the matter. The magistrate will then submit a written report to the district judge for a final determination of the matter. Any party may object to any specific portion of the magistrate's report within time limits to be fixed by local court rules.

The study of the use of masters in the English judicial system and the experience with the use of magistrates in pretrial proceedings in several United States district courts suggest that magistrates can significantly assist the district courts by freeing the district judges from the conduct of proceedings prior to trial. The time of the judges is more effectively spent in the actual trial of cases and the writing of opinions. In addition, the trial judge will be able to take the bench free from any potential prejudice arising from participation in pretrial proceedings and settlement discussions.

Subsection (b)(1)- -ond sentence—Prisoner petitions

In addition, proposed subsection (b)(1) of 28 U.S.C. §636 specifically authorizes the designation of a magistrate to conduct evidentiary hearings and make recommendations for the disposition of applications for post-trial relief by individuals convicted of criminal offenses and of petitions challenging the conditions of confinement. The reference to the type of post-trial relief tracks the language of the exsiting statute and covers applications by both state and federal prisoners for *habeas* relief under 28 U.S.C. §§2254 and 2255. It does not cover applications for reduction of sentence, made to the judge who originally imposed the sentence, pursuant to Rule 35 of the Federal Rules of Criminal Procedure. Both federal and state prisoners are covered when the conditions of confinement are challenged.

The growing volume and increasing complexity of prisoner petitions have seriously burdened the federal courts. During the fiscal year 1974, petitions by federal and state prisoners accounted for 18 percent of all the civil cases filed in the district courts. The problem is heightened by the fact that most of these petitions are unevenly distributed among the courts.

Although petitions filed by prisoners challenging their conviction or conditions of confinement may raise serious legal and constitutional questions, the great majority of those filed in the federal courts are eventually dismissed for lack of merit. Proposed subsection (b)(1) expands the jurisdiction of United States magistrates by explicitly authorizing them to conduct evidentiary hearings on the facutal merits of prisoner controversies and to make recommendations to the district court for appropriate disposition. In light of the recent Supreme Court decision in the *Wedding* case, it is necessary that the power of magistrates to conduct evidentiary hearings in these cases be set forth explicitly in the statute.

The proposal will expedite prisoner litigation in the district courts and give prisoners prompt access to a competent judicial officer. In civil rights cases filed by inmates, for example, a magistrate will be able to conduct proceedings at the

prison facility for the court, by acting as an ombudsman or arbitrator, by promoting settlement of the dispute, or by conducting an evidentiary hearing where necessary. Following a prompt evidentiary hearing by a magistrate, moreover, a prisoner litigant is entitled as a matter of right to a *de novo* hearing of his petition before a district judge upon the filing of specific and timely objections to the magistrate's proposed findings of fact and conclusions of law.

Subsection (b)(1)—third sentence—Review

Finally, proposed subsection (b)(1) of 28 U.S.C. §636 provides that any party has a right to contest any determination, report, finding of fact, or conclusion of law made by a magistrate. In such cases, the district judge is required to conduct an inquiry into the specific allegations of error in the same manner as if he were hearing the matter initially. This proposed amendment is not intended to create any greater right to a full hearing before a district judge than would have existed if the issue had been presented to the judge in the first instance. Of course, the district judge need not conduct any hearing on those matters to which no specific objection is made.

The proposed amendment does not specify a particular time within which a party must object to a magistrate's determination. Proposed subsection (b)(1) authorizes the performance of widely diverse duties by magistrates. Accordingly, the fixing of specific time limits for particular proceedings is left to the normal rule-making processes for the district courts.

The study on the role of masters in the English judicial system emphasized the absence of time-consuming and wasteful paperwork in that country's courts. In adopting much of the English practice in the use of masters, it is not intended that a cumbersome requirement of extensive, written reports be engrafted onto the magistrate system. In the case of many simple and routine matters, not dispositive of the litigation, the magistrate will determine the issues raised, subject to the parties' right to appeal. In more complicated matters—particularly those requiring the conduct of an evidentiary hearing—a report which includes separate findings of fact, conclusions of law and a recommended disposition of the issues will be required to be made to the district judge. The parties will have an opportunity to object to any specific aspect of the report.

By requiring that a district judge conduct a *de novo* hearing on any specific objection raised by any party, proposed subsection (b)(1) may well generate some duplication of effort in a particular case. However, the experience to date on the use of magistrates in several United States district courts and the report of the role of masters in the English courts are persuasive that there will be, overall, a considerable savings of the time of district judges, since objections will normally be made only in a relatively few instances.

Subsection (b)(2)

Proposed subsection (b)(2) of 28 U.S.C. § 636 authorizes a magistrate to serve as a special master to try the issues of a case. The first sentence restates the authorization for such service which is contained in the existing statute. Service as a special master is restricted by the provisions of the Federal Rules of Civil Procedure where the reference is made over the objection of either party. Although the reference of a case to a magistrate as a special master does not entail the same objections as a reference to a private attorney, these restrictions are retained in light of the desire to meet any possible constitutional requirement that a litigant have the ultimate determination of his case made by an article III judge.

The second sentence of proposed subsection (b)(2) provides an exception to this general rule in those cases where the parties consent to the reference. This exception takes such cases out from the restrictions of Rule 53(b), which limits the conditions under which cases may be referred to a master, since no significant purpose is served by restricting the use of magistrates where the parties agree to this procedure. At the same time, Rule 53 contains many important rules governing the powers of masters, the conduct of proceedings before them, and the submission of reports. Proposed subsection (b)(2) retains these provisions in any case in which a magistrate is appointed as a special master.

Subsection (b)(3)

Proposed subsection (b)(3) provides for the assignment to a magistrate of any other duty not inconsistent with the Constitution and laws of the United States. A similar provision is contained in the existing legislation. This subsection enables the district courts to continue innovative experimentations in the use of this relatively new judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.

Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters." This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.

If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

Subsection (b)(4)

Proposed subsection (b)(4) of 28 U.S.C. § 636 requires each district court to adopt local rules of court governing the performance of these duties by magistrates in the district. This requirement is carried over from the existing statute. It ensures that a magistrate will not be so burdened by assignments from one judge that he cannot assist the other judges in the district. Further, by requiring the promulgation of such local rules of the court, the statute provides the local bar at least some advance notice of the potential assignment of a case to a magistrate.

[The previously mentioned letters of Judges Belloni and Wellford follow:]

UNITED STATES DISTRICT COURT,
DISTRICT OF OREGON,
Portland, July 8, 1975.

Senator QUENTIN N. BURDICK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BURDICK: Re: S. 1283. The district judges of the district of Oregon strongly support S. 1283 as printed on June 17, 1975.

This district has such a heavy caseload that we must of necessity utilize our magistrates to the best possible advantage. This bill will enable us to do that with a much more secure feeling than at present with the unsure state of the law respecting a magistrate's authority.

Attached hereto is a copy of a speech I made to the National Association of United States Magistrates at Colorado Springs, Colorado on May 15, 1975. It tells of the manner in which we use our full time magistrate.

Sincerely,

ROBERT C. BELLONI.

ROBERT C. BELLONI, CHIEF JUDGE, DISTRICT OF OREGON

I claim, somewhat immodestly, that the District of Oregon has utilized its United States Magistrates as effectively as any district in the country and has elevated the position to one of great importance to the bar and the courts. And, from the viewpoint of the magistrate himself, it has converted a potentially dull and underpaid position into an extremely satisfying and underpaid position.

Before I get into the role of the magistrate in Oregon I should briefly outline the system onto which it was engrafted and the condition of our court when we got our full time magistrate.

The District of Oregon was nearly overwhelmed with work. We are consistently in the top 20 districts with the heaviest caseloads. Each year our caseloads grow, sometimes as much as 20%. Each year our district judges simply absorbed the increase by working harder and more effectively. But obviously a point is soon reached where a district runs further behind even though the judges use every innovative device possible, along with its increased effort.

We had been watching the legislation to create the new office of magistrate with great interest and we did what we could to encourage its passage. When it became law we started planning in earnest for it. We really didn't know how much help we could get from the magistrate. We were disappointed with his limited authority. Our first decision was to find the best man in Oregon for the position and then convince him that he should take it. We looked over the most able and respected judges in the state judicial system, selected the one we wanted and then stole him. This might not be one of the best ways to foster federal-state relations but it is one of the best ways to get a federal magistrate. Our recruiting effort was made

easier by the fact that Oregon State judicial salaries were then even lousier than federal judicial salaries. His salary now, bad as it is, is equal to that paid to the Chief Justice of the Supreme Court of Oregon.

Oregon is one of the very few districts which continues to use the master calendar system. It is currently popular to run that system down and to extoll the virtues of the individual calendar. Nevertheless we believe it is the best system for Oregon. It's hard to convince us that we should change since each of our judges is trying nearly double the national average number of cases per year and our docket is current in spite of an overwhelming growth in our caseload.

We have three active district judges, one full time senior judge and a full time magistrate in Portland, where the vast majority of our cases are heard.

Our master calendar is facilitated by holding a monthly call for about ¼ of our 1100 pending cases. Lawyers for both sides appear for the call calendar. It is usually presided over by the chief judge or by the magistrate. The object is to facilitate the cases for trial. Each such call day all cases which are ready are set for trial on a week-certain some two or three months ahead.

In routine cases no district judge even sees these files until a couple weeks before trial when the case is assigned to a certain judge for a day-certain. That district judge then schedules a final pretrial conference and tries the case. All other problems—discovery motions, procedural motions, even motions which are dispositive are handled by our U.S. magistrate. With 1100 pending cases and 1100 civil filings a year this is indeed a big job. He hears approximately 80 motions per month or 1000 each year. A list of them is all inclusive—motions to make more definite and certain, for bills of particulars, for protective orders, change of venue, motions to dismiss, summary judgment motions.

But this is only a small part of his job. He handles all the traditional magistrate's criminal work. He has a very heavy part in administering the criminal calendar of about 300 cases per year including the taking of all not-guilty pleas and setting cases for trial. He appoints all counsel for indigent defendants. He holds evidentiary hearings and rules on motions to suppress and other important criminal pretrial motions.

In the post-trial cases, he hears and recommends a disposition in all *prisoner petition* cases. He held evidentiary hearings in all *habeas corpus* cases until we learned from *Wedding* v. *Wingo* that he couldn't *do* that. He takes most of our social security appeals on a recommendation and order basis.

Now this is not enough to keep him busy, so we give him *more—much* more.

When we set our trials for a week—certain we set far more than any four district judges can handle so that when cases settle all our judges have another case in the wings. In no other way could we possibly each be trying the large number of cases that we do. Sometimes, of course, we find that the expected percentages of cases did not settle and we have more trials than four district judges are able to handle. What do we do? You guessed it—we call on Magistrate Juba. The lawyers stipulate and Judge Juba presides over the jury or nonjury trial exactly as if he were a district judge. Even when the district judges are able to take all the cases, one trial follows another so closely that in order to get to the next case without delay, Judge Juba will receive the verdict in a case tried by one of the other judges and he will preside over the voir dire and jury selection of a trial to begin momentarily before a judge who is putting the finishing touches on his current case.

Complex civil cases are handled differently. Those are assigned to a particular judge when they are first filed. He schedules all discovery and handles all motions through the course of the case and then tries it.

There is one exception to this practice. Magistrate Juba does this for the 25% of those cases which are assigned to me. This allows me time to do the necessary administrative work which falls to the chief judge. I take a full case load but I do gain this extra time by being relieved by the magistrate. I get the complex case back from George when it's fully ready to try.

How does he do all of this wihtout a law clerk? He can't. I have two law clerks on my personal staff and I assign one of them at a time to work full time for Judge Juba. I need them both myself but he needs one worse than I need two and he does relieve me of the pretrial burden of my complex cases.

I will not go into all of the functions of our full time magistrate but some of the other interesting duties are: He tries the damage issue in complex cases when liability has been admitted or established. He usually does this by stipulation rather than as a special master. He hears default cases where the court needs testimony before it can comfortably grant a judgment. He supervises and trains

our part time magistrates. He does many more things. The list could go on and on. In fact the list of judicial duties which he does not do would be a short list. Unfortunately he does not and cannot hear even minor indirect contempt cases. Remedial legislation is needed there.

As to S.1283, this is the Oregon practice. In other words George Juba hears and determines all pretrial motions except those that are dispositive. He hears the dispositive motions and recommends. If the district judge agrees he simply certifies, "After reviewing the file and record in this case, I approve the above recommendation."

The only difference in our practice and S.1283 is that the bill requires a provision for review. We don't even have a provision for review. Ideally, I would leave it out of the bill but I'm afraid it wouldn't pass without it.

How can we do all of this? We just do it. It's not necessary that we find authority in black and white before we give something to the magistrate. Congress intended for the courts to be innovative and to figure out the best way to utilize the magistrate. To do this we can't be timid. We must try our wings. Sure we might get shot down once in awhile by an appellate court. So what? How else are we going to find out how far we can go. How else can we expand our jurisdiction so that the magistrate becomes a useful judicial officer? Indeed it may just be that the Oregon experiment, since it works, will help pass S. 1283. Unquestionably our practices have been responsible for broadening magistrate powers in cases in which our practices have been appealed. It is true that we have a circuit, the 9th, which is sympathetic with our goals of strengthening the magistrates.

When I tell you that the Oregon practice is the one proposed in S. 1283 I do not mean that S. 1283 is not necessary. It is necessary and we in Oregon are 100% behind it. I do believe though that in the 9th circuit opinions, we can find authority for everything he does. Oh, we have no authority which says he can preside over trials but we start with the assumption that a magistrate can do almost anything a district judge can if the parties agree to it in advance. We feel *Campbell* v. *U.S.* is authority for him to hear dispositive motions and recommend. That was a criminal case. The magistrate heard and decided the facts and he ruled on a motion to suppress which was, in that case, dispositive. If he can do all of that I think he can do everything S. 1283 calls for.

How can we do so much more with our magistrate than some other districts? There are several ingredients.

1. District Court Judges who from necessity instituted the program and saw it work.
2. A circuit that believes the magistrate should be given broad authority.
3. A magistrate that commands the respect of the local bar and of his own article III judges.

Let me talk to you about this third ingredient; the respect and confidence of the bar. A magistrate can only be as effective as the bar will allow him to be.

It would do the district court no good for the magistrate to hear 1,000 cases a year if the lawyers requested a review of all of them.

Obviously he couldn't try jury and non jury cases without a stipulation but lawyers will stipulate, if and only if, they have as much respect and confidence in the magistrate as they do in the district judges. Thus it behooves courts who wish to have effective magistrates to have the best. The selection process is important. Salaries should be substantially increased. And magistrates themselves should provide for their own continuing education through the Federal Judicial Center and through seminars such as this one being held in Colorado Springs.

I will close this opening statement by telling you something that I sincerely believe but I have no way to prove it.

I sincerely believe that if I had one full time magistrate who could work with me exclusively, this two-judge team could produce *at least double* the amount of judicial work that I can now do as an individual district judge.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TENNESSEE,
Memphis, Tenn., June 12, 1975.

Senator QUENTIN BURDICK,
Senate Office Building,
Washington, D.C.

DEAR SENATOR BURDICK: I read with interest the introduction of your Senate Bill 1283 which would expand the jurisdiction of United States Magistrates. Since perhaps more questions have been raised in our particular Circuit, the Sixth Circuit, with regard to the use of magistrates, we are particularly interested in this

legislation and hope that you might be successful in persuading your fellows to bring about its enactment. We believe that it would be of great assistance in our duties and responsibilities, particularly with respect to post-conviction applications and prisoner petitions.

Please advise us the names of any other Senators to whom we should write in respect to consideration of this legislation.

Yours very truly,

HARRY W. WELLFORD.

[Whereupon, at 10 a.m., the committee recessed, subject to the call of the Chair.]

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[COMMITTEE PRINT]

SEPTEMBER 13, 1975

94TH CONGRESS
1ST SESSION

S. 1283

IN THE SENATE OF THE UNITED STATES

MARCH 21 (legislative day, MARCH 12), 1975

Mr. BURDICK (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

[Omit the part struck through and insert the part printed in italic]

A BILL

To improve judicial machinery by further defining the jurisdiction of United States magistrates, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 636(b) of title 28, United States Code, is amended to read as follows:

"~~(b)(1) Notwithstanding any provision of law to the contrary, a judge may designate a magistrate to hear and determine, subject to review as hereinafter provided, any pretrial matter pending before the court except motions which are dispositive of the litigation, the disposition of which the magistrate may recommend, but not order. A judge may~~

~~also designate a magistrate to conduct evidentiary hearings and make recommendations for the disposition of applications for post-trial relief made by individuals convicted of criminal offenses and prisoner petitions challenging conditions of confinement. Upon timely request, as fixed by local rule of court, by any party who has appeared before the magistrate, either personally of by submission of affidavits or brief, the court shall hear de novo those portions of the report or specific proposed findings of fact or conclusions of law to which objection is made.~~

~~"(3) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.~~

~~"(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.~~

~~"(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.".~~

"(b)(1) Notwithstanding any provision of law to the contrary—

"(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action for failure to comply with an order of the court. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.".

R.A. 49

[COMMITTEE PRINT]

SEPTEMBER 15, 1975

94TH CONGRESS
1ST SESSION

S. 1283

A BILL

To improve judicial machinery by further defining the jurisdiction of United States magistrates, and for other purposes.

By Mr. BUMPERS

MARCH 21 (legislative day, MARCH 12), 1975
Read twice and referred to the Committee on the Judiciary

[COMMITTEE PRINT]

94TH CONGRESS } SENATE { REPORT
1st Session } { No. 94–

JURISDICTION OF U.S. MAGISTRATES

———Ordered to be printed

Mr. ———, from the Committee on the Juidiciary, submitted the following

REPORT

[To accompany S. 1283]

The Committee on the Judiciary, to which was referred the bill (S. 1283) to improve judicial machinery by further defining the jurisdiction of the United States magistrates, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

PURPOSE OF THE BILL

The purpose of the bill is to amend section 636(b), title 28 United States Code, in order to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court. These additional duties generally relate to the hearing of motions in both criminal and civil cases, including both preliminary procedural motions and certain dispositive motions. The bill provides for different procedures depending upon whether the proceeding involves a matter preliminary to trial or a motion which is dispositive of the action. In either case the order or the recommendation of the magistrate is subject to final review by a judge of the court.

AMENDMENT

The committee proposes an amendment by striking everything commencing at page 1, line 5, of the bill through line 4, page 3, of the bill and inserting in lieu thereof the following:

(b) (1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on

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the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action for failure to comply with an order of the court. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

Purpose of Amendment

The purpose of the amendment is to further perfect the language of the proposed new section 636(b)(1) as amended by Printed Amendment No. 589. This further amendment grants to the magistrates the power (1) to hear and determine certain pretrial motions, and (2) to hear and recommend a disposition of certain dispositive motions, including certain habeas corpus proceedings and certain prisoner petitions. In each case a review by a district court judge is required.

Statement

When the Congress enacted the Magistrates Act in 1968 (P.L. 90–578), it created a system of full-time and part-time judicial officers who would perform various judicial duties under the supervision of the district courts in order to assist the judges of these courts in handling an ever-increasing caseload.

In the 93rd Congress, the Judiciary Subcommittee on Improvements in Judicial Machinery held 17 days of hearings, during which extensive inquiry was made into the caseload of federal district courts. During these hearings, the chief judges of 44 of the federal judicial districts personally appeared and testified before the subcommittee. The vast majority of the chief judges who testified stated that the magistrates were of assistance to the court in handling certain preliminary matters in both civil and criminal cases, and were of greatest assistance in handling petitions for the issuance of a writ of habeas corpus made by both state and federal prisoners in an effort to obtain a collateral review of the original conviction. A few of the district courts which had not made extensive use of the services of the magistrates were encouraged to do so as a means of freeing time of district court judges to preside at trials of other cases.

In several of the districts, the majority of the judges of the court authorized magistrates to hold evidentiary hearings in habeas corpus cases and to submit to a judge of the court recommended findings of fact and conclusions of law dispositive of the petition for a writ of habeas corpus. The recommendations of the magistrate would be reviewed by the judge who would then exercise the ultimate authority to issue an appropriate order.

However, on June 26, 1974, in the case of *Wingo* v. *Wedding*, 418 U.S. 461, the Supreme Court of the United States interpreted Section 636(b) of Title 28 of the U.S. Code, as authorizing the magistrate to make merely a "preliminary review" of a prisoner petition and expressly held that the statutory language did not evidence any intent by Congress that the magistrate be authorized to hold an evidentiary hearing in a habeas corpus proceeding

In a dissenting opinion, the Chief Justice and Justice White dissented on the basis that Section 636(b) "should be interpreted to permit magistrates to conduct evidentiary hearings in federal habeas corpus cases", since such an interpretation would serve the principle objectives of the Magistrates Act. The dissenting opinion concluded with the following statement:

> In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intentions if its declared objectives are to be carried out.

The bill under consideration by the committee would accomplish this restatement and clarification of the Congressional intention that the magistrate should be a judicial officer who, not only in his own right but also under general supervision of the court, shall serve as an officer of the court in disposing of minor and petty criminal offenses, in the preliminary or pretrial processing of both criminal and civil cases, and in hearing dispositive motions and evidentiary hearings when assigned to the magistrate by a judge of the court.

In addition to *Wingo* v. *Wedding* there are several other court decisions the result of which would be overcome by passage of this bill. In *T.P.O.* v. *McMillan* (7th Cir. 1972) 460 F.2d 348, the court held that a magistrate could not hear a motion to dismiss or a motion for summary judgment, even though an appeal was allowed from a final order of a magistrate to a judge of the district court. In *Ingram* v. *Richardson* (6th Cir. 1972) 471 F.2d 1268, the court held that a magistrate had no power to review the Secretary's denial of social security benefits and to make proposed findings of fact and conclusions of law which proposed order was then submitted to a district court judge for final decision. In *T.P.O.* v. *McMillan*, supra, the court stated:

> We need not speculate in regard to what civil functions the magistrate can constitutionally perform, however, since Congress carefully intended that in regard to civil cases the magistrate was not empowered to exercise ultimate adjudicatory or decision making.

Also, in *Wilver* v. *Fischer* (10th Cir. 1967) 387 F.2d 66, which predated the Magistrates Act, the court held that a master could not be appointed to supervise discovery proceedings in civil actions.

In 1968, when the Magistrates Act was passed, the total filings in the United States District Courts were 102,000 cases. In 1974, total filings amounted to 143,000 cases. In 1968, there were 323 district court judges. In 1974, there were 400 district court judges. The Congress in enacting the Magistrates Act manifested its intention to create a judicial officer and to invest in him the power to furnish assistance to a judge of the district court. The magistrate was given jurisdiction over petty criminal offenses and the Act also gave each district court the discretionary power to use the magistrate to assist a district court judge "in the conduct of pretrial or discovery proceedings in civil or criminal actions" and to make a "preliminary review of applications for posttrial relief" and to submit a report and recommendations "to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing".

The language quoted above is from the 1968 Magistrates Act. In *T.P.O.* v. *McMillan*, the decision restricting the power of magistrates in pretrial proceedings hinged on the judicial interpretation of congressional intent. Similarly, in *Wingo* v. *Wedding* the authority of the magistrate to hold an evidentiary hearing in a habeas corpus proceeding also hinged on an interpretation of congressional intent.

It seems to the committee that in 1968 the Congress clearly indicated its intent that the magistrate should be a judicial officer whose purpose was to assist the district judge to the end that the district judge could have more time to preside at the trial of cases, having been relieved of part of his duties which required the judge to personally hear each and every pretrial motion or proceeding necessary to prepare a case for trial. That the magistrate has fulfilled this function seems clear from the statistics relating to magistrate activity in F.Y. 1974. In that year magistrates handled a volume of matters as shown in the following table:

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Criminal cases:	
Minor offenses	11,242
Petty offenses	71,463
Arrest warrants	27,029
Search warrants	3,649
Bail hearings	58,634
Preliminary examinations	7,124
Removal hearings	2,816
Subtotal	182,857
Post indictment arraignments	13,906
Pretrial conferences	6,313
Pretrial motions	7,118
Other criminal matters	691
Subtotal	28,028
Total criminal matters	210,885
Civil cases:	
Prisoner petitions	7,455
Pretrial conferences	15,743
Motions	5,985
Special master reports	367
Social security cases	277
Narcotic addict rehabilitation cases	320
Other civil matters	1,897
Total civil cases	32,044

Rather than constituting "an abdication of the judicial function", it seems to the committee that the use of a magistrate under the provisions of S. 1283, as amended, will further the congressional intent that the magistrate assist the district judge in a variety of prerial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case.

The Federal Rules of Civil Procedure provide many opportunities for the parties by motion to invoke a decision of the court. These opportunities range from a motion under Rule 6(b) to extend the time for an act, or a motion under Rule 4(e) specifying the manner of serving a summons, to a motion under Rule 12(b) to dismiss, or a motion under Rule 56 for summary judgment on the grounds that there is no genuine issue of fact to justify a trial. In between these extremes are various motions relating to discovery, to production of evidence, to physical examination of a party, to join necessary or proper parties, to set the time and place of a disposition, to suppress evidence, and to hold a pretrial conference under Rule 16, and others too numerous to mention.

Without the assistance furnished by magistrates in hearing matters of this kind, and others not specifically named, it seems clear to the committee that the judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather than to the trial itself.

Therefore, the committee has concluded that the enactment of S. 1283, as amended, will further improve the judicial system by clearly defining the additional duties which a judge of the district court may assign to a magistrate in the exercise of the discretionary power to so assign as contained in Section 636(b) of Title 28 United States Code as herein amended.

Before turning to a detailed explanation of the bill, the committee believes that it should comment upon the contention that Article III of the Constitution imposes a limitation upon the judicial functions which this bill vests in a magistrate. In the federal court system, the primary court of general jurisdiction has always been the district court and, as such, it is an "inferior court" ordained and established by the Congress under Article III. But this is not to say that the Congress may not create other inferior courts. For example, it is believed that it would be competent for the Congress to create below the district courts a court of limited jurisdiction which would be roughly the equivalent of a municipal court in some of the state systems. Multi-tiered court systems developed simply in recognition of the fact that certain cases and judicial functions are of differing importance so as to justify different treatment by the court system. While the U.S. District Court has long been a single tiered court as far as original jurisdiction is concerned, the Congress has nevertheless recognized that it is not feasible for every judicial act, at every stage of the proceeding, to be performed by "a judge of the court".

In several instances, the Congress has vested in officers of the court, other than the judge, the power to exercise discretion in performing an adjudicatory function, subject always to ultimate review by a judge of the court. For example, a judgment or order of a referee in bankruptcy, adjudicating legal rights, is a final order unless an appeal is taken to a judge of the district court. Title 11 U.S.C., section 67(c); Rule 801, Rules of Bankruptcy Procedure.

Also, section 636(a)(3) of Title 28 vests in the magistrates the power to try persons accused of minor criminal offenses, which power was formerly vested in a United States Commissioner. Thus, under section 3401 of Title 18 United States Code, the magistrate has jurisdiction to try minor offenses and under section 3402 of Title 18, an appeal may be taken from the judgment of the magistrate to a judge of the district court.

Finally, section 1920 of Title 28 United States Code authorizes "a judge or clerk of any court" to tax costs in a case. Rule 54(d) of the Rules of Civil Procedure implements section 1920 by providing that costs may be taxed by the clerk on one day's notice and that on notice "the action of the clerk may be reviewed by the court". Therefore, by analogy, the committee believes that the judicial functions vested in the magistrates, as a judicial officer, by this bill are not in violation of Article III of the Constitution.

Explanation of the Bill

No changes are made in section 636(a) of title 28 under which magistrates exercise the powers with respect to issuance of arrest warrants, search warrants, setting bail, preliminary hearings, and the trial of minor and petty offenses under section 3401 of title 18, United States Code.

The bill revises in its entirety section 636(b) under which magistrates could be assigned certain additional duties in the discretion of the court. This discretionary power to assign additional duties to a magistrate is continued but the discretion is vested in a judge of the district court rather than in a majority of all the judges of the court.

Of course the scope of any permissible additional duties to be assigned can still be agreed upon by a majority of the judges, but the bill will permit exercise of the actual power of assignment to a single judge. Since assignments are frequently made in individual cases, or on an ad hoc basis, it seems preferable to vest the power in a single judge who can execute any required order of assignment or reference.

The initial sentence of the revised section uses the phrase "notwithstanding any provision of law to the contrary—". This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court". It is not feasible for the Congress to change each of those terms to read "the judge or a magistrate". It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court".

The additional duties which can be assigned to a magistrate are classified into three categories set forth in subparagraphs (A) and (B) of subsection 636(b)(1) and in subsection 636(b)(2). These categories and the scope of the magistrates authority are as follows:

1. Pretrial matters.—Under subparagraph (A) a judge, in his discretion, may assign any pretrial matter to be heard and determined by a magistrate. In scope, this includes a great variety of preliminary motions and matters which can arise in the preliminary processing of either a criminal or a civil case. As indicated by the statistical table set forth earlier in this report many of the magistrates are already hearing these pretrial matters under the authority contained in subsection 636(b)(2) of the present law. A statement was received at the hearing on July 16, 1975, from Chief Judge Belloni of the District of Oregon setting forth a description of the various motions and pretrial proceedings which have been assigned to Magistrate Juba by the judges of the Oregon Court. A similar scope of additional duties is intended for magistrates under the provisions of S. 1283, as amended. Thus, the revised law will not unduly extend the magistrates' authority to hear pretrial matters but it will clarify the broad authority to refer "any pretrial matter".

Subject to the exception of the dispositive motions expressly named in subparagraph (A), the magistrate shall have the authority to not only hear the pretrial matter but also to enter an order determining the issue raised by the motion or proceedings. The magistrate's determination is intended to be "final" unless a judge of the court exercises his ultimate authority to reconsider the magistrate's determination.

The last sentence of subparagraph (A) makes it clear that a judge of the court has the ultimate judicial prerogative to review and reconsider a motion or matter "where it has been shown that the magistrate's order is clearly erroneous or contrary to law". The standard of "clearly erroneous or contrary to law" is consistent with the accepted and existing practice followed in most district courts when reviewing a pretrial matter assigned to a magistrate under existing law.

Use of the words "may reconsider" in subparagraph (A) is intended to convey the congressional intent that a matter "heard and determined" by the magistrate need not in every instance be heard a second time by the judge. However, if a party requests reconsideration based

upon a showing that the magistrate's order is clearly erroneous or contrary to law then the judge must reconsider the matter.

Thus, the revision proposed in this bill makes it clear that Congress intends that the magistrate shall have the power to make a determination of any pretrial matter (except the enumerated dispositive motions) and that his determination set forth in an appropriate order shall be "final" subject only to the ultimate right of review by a judge of the court. Under section 631 of the Magistrate Act (28 USC 631), a magistrate is required to be a member of the bar whose experience in the practice of law has been such as to persuade the appointing judges that he is competent to perform the duties of the office. If a particular magistrate does not have this competence it is assumed that a judge would not assign particular matters to the magistrate for hearing and determination. However, assuming such competence, it seems to the Committee to be inefficient and duplicative to require a "report and recommendation" from the magistrate to the judge as a prelude to a separate order by the judge in order to dispose of preliminary and pretrial matters. Thus the statute uses the term "hear and determine" in vesting the authority of a magistrate, subject, of course, to ultimate review by the court.

While subparagraph (A) does not specify a procedure to be followed by a party in obtaining reconsideration of a magistrate's order by the judge, it would normally be by motion duly served, filed and noticed. However, in some districts the local rules now in existence provide merely that the request for review be in a letter or other written form. Nor is a fixed time specified within which to obtain review of a magistrate's order in "any pretrial matter", since what is a timely request to a judge of the court will depend upon the nature of the pretrial matter. For example, an order by the magistrate under Rule 13(f) granting leave to serve and file an amended pleading asserting an omitted counterclaim, could be reviewed by a judge in due course and at a time set by the court or noticed by the parties. In such an instance there would be ample time within which the matter could be reconsidered. On the other hand, suppose a pretrial order under Rule 16 is issued by the magistrate following a pretrial conference held a week or less before a day certain setting for trial. In that instance, time is of the essence and review of the order by a judge should be sought and the matter reconsidered as soon as possible. Thus, under subparagraph (A), it is intended that the method and procedure for seeking reconsideration of a magistrate's determination of a pretrial matter can be set by local rules of court pursuant to section 636(b)(4), or by uniform rules, if uniformity is deemed necessary.

2. Dispositive motions, Habeas Corpus, and Prisoner Petitions.—As stated previously in this report, certain motions which are dispositive of the litigation are specifically excepted from the magistrate's power under subparagraph (A) "to hear and determine". These excepted motions are:

(1) A motion for injunctive relief;
(2) A motion for judgment on the pleadings;
(3) A motion for summary judgment;
(4) A motion to dismiss or quash an indictment made by the defendant;
(5) A motion to suppress evidence in a criminal case;

(6) A motion to dismiss for failure to state a claim upon which relief can be granted; and,

(7) A motion to involuntarily dismiss an action for failure to comply with an order of the court.

It is not intended that a magistrate shall have the power under subparagraph (A) "to hear and determine" such dispositive motions. However, depending upon the qualifications and competence of a particular magistrate, it is intended that under subparagraph (B) a judge of the court, in his discretion, may assign such dispositive motions to a magistrate for hearing and submission of proposed findings and recommendation to a judge of the court for ultimate disposition.

Not only may these dispositive motions be assigned to the magistrate under subparagraph (B) but also there may be assigned application for posttrial relief made by individuals convicted of criminal offenses and petitions under section 1983 of title 42 United States Code brought by prisoners' challenging the conditions of their confinement. The authority of the magistrate under subparagraph (B) is clearly more than authority to make a "preliminary review". It is the authority to conduct hearings and where necessary to receive evidence relevant to the issues involved in these matters. Therefore, passage of S. 1283, as amended, will supply the congressional intent found wanting by the Supreme Court in *Wingo* v. *Wedding*, supra. Also this bill will overcome the effect of the decision in *T.P.O.* v. *McMillan*, supra, relating to motions to dismiss or motions for summary judgment. Further, passage of this bill will also permit a judge to refer to a magistrate the consideration and study of cases brought to review the Secretary's determination of entitlement to benefits under the Social Security Act, since these matters usually involve a motion by the agency for summary judgment.

Under subparagraph (B) the magistrate is required to submit proposed findings and his recommendation to the judge for disposition of the various proceedings included in subparagraph (B). As specified in subparagraph (C) a copy of the proposed findings and recommendation must be mailed to all parties. Written objections must be filed within 10 days. This is substantially the procedure and the time limit specified in Rule 53 where there has been a reference to a master. The bill would permit the court by local rules to specify whether the written objections must be in the form of a motion or other written form, as well as to specify any procedure for bringing the matter on for a formal hearing, if a formal hearing is to be required.

The judge is given the widest discretion to "accept, reject or modify" the findings and recommendation proposed by the magistrate, including the power to remand with instructions. Thus, it will be seen that under subparagraph (B) and (C) the ultimate adjudicatory power over dispositive motions, habeas corpus, prisoner petitions and the like is exercised by a judge of the court after receiving assistance from and the recommendation of the magistrate.

3. Special Master and Trial by Consent.—The third category of magistrates' additional duties is set forth in the proposed subsection 636(b)(2). The subsection expressly authorizes the magistrate to be appointed as a special master under Rule 53 of the Federal Rules of Civil Procedure. This merely carries forward the same provision in

section 636(b)(1) of the existing law. This also carries with it a requirement that if a party objects to the reference to a master, the requirements and restrictions of Rule 53 must be met.

The second sentence of this subsection provides an exception to this the magistrate, to serve where one of the parties objects to the reference. This exception takes such cases out from the restrictions of Rule 53(b), which limits the conditions under which cases may be referred to a master, since no significant purpose is served by restricting the use of magistrates where the parties agree to this procedure. At the same time, Rule 53 contains many important rules governing the powers of masters, the conduct of proceedings before them, and the submission of reports. Thus, subsection 636(b)(2) retains these provisions in any case in which a magistrate is appointed as a special master.

Enactment of this new subsection 636(b)(2), and experience in the use of magistrates as special masters, may serve to occasion a reappraisal of the power of the court to appoint a special master, i.e., the magistrate, to serve where one of the parties objects to the reference. [See. *La Buy* v. *Howes Leather Co.* (1957), 352 U.S. 249.] Indeed, the magistrate is not an attorney in private practice "appointed on an ad hoc basis" and the magistrate is experienced in judicial work.

Other Provisions of the Bill

Proposed subsection 636(b)(3) provides for the assignment to a magistrate of any other duty not inconsistent with the Constitution and laws of the United States. A similar provision is contained in the existing legislation. This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.

Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters". This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.

If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

Proposed subsection 636(b)(4) permits each district court to adopt local rules of court governing the performance of these duties by magistrates in the district. This requirement is carried over from the existing statute. It ensures that a magistrate will not be so burdened by assignments from one judge that he cannot assist the other judges in the district. Further, by requiring the promulgation of such local

rules of the court, the statute provides the local bar at least some advance notice of the potential assignment of a case to a magistrate. As discussed previously in this report, these local rules may also specify procedures for obtaining reconsideration of a magistrate's order under subparagraph (A) and may supplement the procedure for objection to proposed findings and recommendations under subparagraphs (B) and (C).

COMMUNICATIONS

A representative of the Judicial Conference of the United States testified at the hearing and conveyed to the committee the Conference Committee on Magistrates' support of S. 1283, as amended. Most of the perfecting amendments suggested by the witness were adopted by the Senate Committee.

ESTIMATED COST

Enactment of the bill does not involve any direct additional cost to the government.

SECTIONAL ANALYSIS

Each section of the bill is discussed in detail in the body of the report.

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law is shown in roman, matter repealed enclosed in black brackets, and new matter is printed in italic):

TITLE 28, UNITED STATES CODE

CHAPTER 43—UNITED STATES MAGISTRATES

§ 636. Jurisdiction, powers, and temporary assignment.

* * * * * * *

[(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the dis-

trict judge having jurisdiction over the case as to whether there should be a hearing.]

"(b)(1) *Notwithstanding any provision of law to the contrary—*

"(A) *a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action for failure to comply with an order of the court. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.*

"(B) *a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.*

"(C) *the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.*

"(2) *A judge may designate a magistrate to serve as special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States District Courts.*

"(3) *A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.*

"(4) *Each district court may establish rules, consistent with this subsection (b) pursuant to which the magistrates shall discharge their duties.".*

RECOMMENDATION

The committee believes that S. 1283, as amended, is meritorious and favorably recommends the same.

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